85-474

Supreme Court, U.S.
FILED
SEP 19 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PATRICK M. HYATT, HERMAN O. CAUDLE AND MARY P. LOVINGOOD, on behalf of themselves and all others similarly situated,

Petitioners,

v.

MARGARET M. HECKLER, or her successors in office, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent,

and

NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DISABILITY DETERMINATION SERVICES,

Intervenor-Nominal Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN R. WESTER
(Counsel of Record)
DAN T. COENEN
ROBINSON, BRADSHAW & HINSON, P.A.
1900 Independence Center
Charlotte, North Carolina 28246
(704) 377-2536
Attorneys for Petitioner

CHARLES MCBRAYER SASSER
LEGAL SERVICES OF SOUTHERN PIEDMONT, INC.
6th Floor, 951 South Independence Boulevard
Charlotte, North Carolina 28202
(704) 376-1608

QUESTIONS PRESENTED

I. HAS CONGRESS STRIPPED FEDERAL COURTS OF THE POWER TO ENJOIN THE SECRETARY OF HEALTH AND HUMAN SERVICES' DELIBERATE AND SYSTEMATIC REFUSAL TO FOLLOW THE CONTROLLING LAW OF THE VERY CIRCUIT IN WHICH SHE ACTS?

II. IS THE 60-DAY REQUIREMENT OF THE SOCIAL SECURITY ACT'S JUDICIAL REVIEW PROVISION, 42 U.S.C. §405(g), JURISDICTIONAL, RATHER THAN A STATUTE OF LIMITATIONS, SO THAT IT NECESSARILY DEFEATS CLAIMS OF PERSONS VICTIMIZED BY THE SECRETARY'S POLICY OF IN-CIRCUIT NONACQUIESCENCE?

III. DOES §405(g) REQUIRE EXHAUSTION OF THE SECRETARY'S PROCEDURES WHENEVER A PLAINTIFF CHALLENGES THE APPLICATION OF AN IMPROPER STANDARD FOR ENTITLEMENT, AND IN PARTICULAR WHEN THE PLAINTIFF ATTACKS THE SECRETARY'S ABUSE OF THE ADMINISTRATIVE PROCESS BY PURSUING A POLICY OF IN-CIRCUIT NONACQUIESCENCE?

IV. DOES JURISDICTION EXIST UNDER THE FEDERAL MANDAMUS STATUTE, 28 U.S.C. §1361, OVER THE CLAIMS OF PLAINTIFFS IN THIS NONACQUIESCENCE ACTION WHO HAVE NOT EXHAUSTED ADMINISTRATIVE REMEDIES OR STRICTLY COMPLIED WITH THE 60-DAY REQUIREMENT UNDER SECTION 405(g)?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
PERTINENT STATUTES AND PROVISIONS	2
STATEMENT OF CASE	2
REASONS FOR GRANTING THE WRIT	8
A. The Court Should Grant the Writ to Consider Whether Congress has Stripped the Federal Judiciary of the Power to Issue Injunctions to Remedy Nonacquiescence	8
1. Federal District Courts must and do have the power to enjoin the Secretary's unconstitutional policy of nonacquiescence	8
2. The Court of Appeals' decision to vacate the injunction to follow *Martin* is especially objectionable	14
3. Whether courts retain the power to enjoin nonacquiescence is a matter of extraordinary importance to the federal judiciary and disabled citizens throughout the nation	15

Page

B. The Court Should Grant the Petition to Consider Important Issues Dividing the Circuits in the Application of the Social Security Acts' Judicial Review Provisions 16

1. The Court should grant the writ to consider whether the 60-day rule of section 405(g) is jurisdictional or a statute of limitations 18

2. The Court should grant the petition to resolve a conflict in the circuits on the question whether exhaustion is required whenever plaintiffs challenge improper eligibility standards and, in particular, when they challenge the Secretary's policy of nonacquiescence 20

3. The Court should grant certiorari to consider whether mandamus jurisdiction is available in a nonacquiescence case if jurisdiction under section 405(g) is not 24

CONCLUSION 26

TABLE OF AUTHORITIES

	Page
CASES	
Albemarle Paper Co. v. Moody, 422 U.S. 404 (1975)	19
Califano v. Yamasaki, 442 U.S. 682 (1979)	9,14 16,24
Califano v. Sanders, 430 U.S. 99 (1977)	13
Carlson v. Green, 446 U.S. 14 (1980)	13
City of New York v. Heckler, 742 F.2d 729 (2d Cir. 1984), *petition for rehearing denied*, 755 F.2d 31 (2d Cir. 1985), *petition for certiorari pending*, No. 84-1923 (filed June 7, 1985)	19,20,22 24,25
Davis v. Passman, 442 U.S. 228 (1979)	13
Dotson v. Schweiker, 719 F.2d 80 (4th Cir. 1983)	*passim*
Elliott v. Weinberger, 564 F.2d 1219 (9th Cir. 1977), *aff'd in part on other grounds sub nom. Califano v. Yamasaki*, 442 U.S. 682 (1979)	24
Ellis v. Blum, 643 F.2d 68 (2d Cir. 1981)	24

	Page
Ganem v. Heckler, 746 F.2d 844 (D.C. Cir. 1984)	24
Graham v. Heckler, 573 F. Supp. 1573 (N.D. W.Va. 1983)	19
Hatchell v. Heckler, 708 F.2d 578 (11th Cir. 1983)	19
Heckler v. Day, ___ U.S. ___, 104 S. Ct. 2249 (1984)	6,7 9–11,14 15,16,18
Heckler v. Lopez, ___ U.S. ___, 104 S. Ct. 221 (1983)	22,23
Heckler v. Ringer, ___ U.S. ___, 104 S. Ct. 2013 (1984)	17,21,23
Holden v. Heckler, 584 F. Supp. 463 (N.D. Ohio 1984)	19,25
Hunt v. Schweiker 685 F.2d 121 (4th Cir. 1982)	18–19
Johnson v. Heckler, ___ F.2d ___, Nos. 85-1254 & 85-1490 (7th Cir. July 30, 1985)	22,23
Kennedy v. Harris, 87 F.R.D. 372 (S.D. Cal. 1980)	19
Kuehner v. Schweiker, 717 F.2d 813 (3d Cir. 1983), *vacated and remanded on other grounds,* 105 S. Ct. 376 (1984)	22,24,25

	Page
Lopez v. Heckler, 725 F.2d 1489 (9th Cir. 1984), with subsequent history at n.4 *infra*	3,19,20 22,23,24 25,26
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)	15
Martin v. Secretary of HEW, 492 F.2d 905 (4th Cir. 1974)	*passim*
Mathews v. Eldridge, 424 U.S. 319 (1976)	17,18,19 20,24,25
Mental Health Association v. Heckler, 720 F.2d 965 (8th Cir. 1983)	19,24
Mode v. Celebrezze, 359 F.2d 135 (4th Cir. 1966)	4
Myers v. Califano, 611 F.2d 980 (4th Cir. 1983)	*passim*
Norton v. Mathews, 427 U.S. 524 (1976)	24
Owens v. Heckler, CV No. 83-2436-WMB (C.D. Cal. 1984), *appeal pending,* No. 85-31 (filed July 5, 1985)	20,22,26
Patti v. Schweiker, 669 F.2d 582 (9th Cir. 1982)	3

Page

Polaski v. Heckler,
585 F. Supp. 1004 (D. Minn. 1984), *aff'd on other grounds,* 751 F.2d 943 (8th Cir. 1984), *petition for certiorari pending sub nom. Heckler v. Polaski,* No. 85-55 (filed July 11, 1985) 17,22,25

Porter v. Warner Holding Co.,
328 U.S. 395 (1946) 13

Rivera v. Heckler,
568 F. Supp. 235 (D.N.J. 1983) 25

Rowland v. Califano,
588 F.2d 449 (5th Cir. 1979) 19

Ryan v. Shea,
525 F.2d 268 (10th Cir. 1975) 24

Starnes v. Schweiker,
715 F.2d 134 (4th Cir. 1983), *vacated on other grounds sub nom. Starnes v. Heckler,* ___ U.S. ___, 104 S. Ct. 2673 (1984) 24

Steiberger v. Heckler,
84 CIV 1302 (LBS) (S.D.N.Y. Aug. 19, 1985) 12,15,16

Thorne v. Weinberger,
530 F.2d 580 (4th Cir. 1976) 4

Weinberger v. Salfi,
422 U.S. 749 (1975) 18,19

Whipp v. Weinberger,
505 F.2d 800 (6th Cir. 1974) 19

CONSTITUTIONAL PROVISIONS

Art. II, §3 2

	Page
Art. III, §1	2
Amend. 5	2
STATUTES AND REGULATIONS	
42 U.S.C. §405(g)	2,5,8 17,18,19 20,24–26
42 U.S.C. §405(h)	2,17
42 U.S.C. §421(a)	6
42 U.S.C. §421(d)	6
42 U.S.C. §1383b(a)	6
42 U.S.C. §1383(c)(1)	6
28 U.S.C. §1331	4,17
28 U.S.C. §1361	2,4,24
28 U.S.C. §1651	2
Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 et seq	6
20 C.F.R. §404.904	6
20 C.F.R. §§404.907 to .921	6
20 C.F.R. §§404.929 to .965	6
20 C.F.R. §§404.967 to .983	6
20 C.F.R. §404.1503	6
20 C.F.R. §404.1529	2
20 C.F.R. §404.1633(b)	2
20 C.F.R. §§405.1429 to .1465	6
20 C.F.R. §416.903	6

	Page
20 C.F.R. §416.1033(b)	2
20 C.F.R. §416.1405	6
20 C.F.R. §§416.1407 to .1421	6
20 C.F.R. §§416.1467 to .1483	6
20 C.F.R. subpart P, App. 1, §4.00C	2
Fed. R. Civ. P. 8(c)	18
Fed. R. Civ. P. 12(b)(1)	18
MISCELLANEOUS	
SSR 82-55	2
SSR 82-58	2
SSR 81-6	2
SSR 82-49c	2
SSR 82-64	2
Interim Circular No. 185	16
Social Security Forum, Vol. 7, No. 6 (June 1985)	16
H.R. Conf. Rep. 98-1-39, 98 Cong., 2d Sess. (1984), reprinted at 130 Cong. Rec. at H9821	9,10–12
Sen. Rep. 98-466, 98th Cong., 2d Sess. (May 18, 1984)	12
American Bar Association Resolution, July 10, 1985	16

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

PATRICK H. HYATT, HERMAN O. CAUDLE AND MARY P. LOVINGOOD, on behalf of themselves and all others similarly situated,

Petitioners,

v.

MARGARET M. HECKLER, or her successors in office, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent,

and

NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DISABILITY DETERMINATION SERVICES,

Intervenor-Nominal Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, Patrick H. Hyatt, *et al.*, petition this Court for a writ of certiorari to review the March 20, 1985 judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The District Court rendered its Findings of Fact, Conclusions of Law and Decision on February 14, 1984.

A-58.[1] Its judgment was filed the same day. A-92. These materials are published at 579 F. Supp. 985. On March 27, 1984, the District Court entered its Order Certifying Class and Requiring Notice. A-95. That Order is not published. The Decision of the Fourth Circuit Court of Appeals was rendered on March 20, 1985, A-43, and is published at 757 F.2d 1455 (4th Cir. 1985).[2]

JURISDICTION

The Court of Appeals entered judgment on March 20, 1985. A-43. All parties filed timely petitions for rehearing in the Court of Appeals on April 3, 1985, and the Court denied these petitions on April 23, 1985. A-57. On July 3, 1985, the Chief Justice granted petitioners an extension of time within which to seek a writ of certiorari through September 20, 1985. A-42. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

PERTINENT STATUTES AND PROVISIONS

This case involves a number of constitutional provisions (*see* Art. II, §3; Art. III, §1; and Amend. 5); statutes (*see* 42 U.S.C. §405(g) & (h); 28 U.S.C §§1361 & 1651; Pub. L. No. 98-460, 98 Stat. 1794), and administrative pronouncements (*see* 20 C.F.R. §§404.1529, 404.1633(b), 416.1033(b) and subpart P, App. 1, §4.00C; SSR 82-55; SSR 82-58; SSR 81-6; SSR 82-49c; SSR 82-64). These materials are set forth in the Appendix. *See* A-1–34.

STATEMENT OF THE CASE

Pursuant to a systematic national policy, the Secretary of Health and Human Services has directed Social Security claims adjudicators to disregard the established law of

---

[1]The Appendix to this petition is cited as "A."

[2]The District Court also rendered an Amended Order Allowing Attorneys' Fees on May 8, 1984. A-102; 586 F. Supp. 1154. The Secretary took a separate appeal from that Order, which the Fourth Circuit disposed of in its decision by remanding for reconsideration of the fee award in light of its opinion. No attorneys' fee question is presented here.

the federal judicial circuits in which they sit. In some instances the Secretary has announced formally her nonacquiescence in particular Court of Appeals decisions.[3] In other instances she has accomplished the same result by insisting that adjudicators adhere to her Social Security Rulings ("SSRs") and the provisions of her Program Operations Manual System ("POMS"), notwithstanding conflicting circuit court authority. A-78–79.

This is one of several class actions brought in response to the Secretary's policy of in-circuit nonacquiescence.[4]

---

[3]For example, in Social Security Ruling ("SSR") 82-49c, A-25, the Secretary announced her decision to nonacquiesce in *Patti v. Schweiker,* 669 F.2d 582 (9th Cir. 1982), which rejected the "current medical evidence" test used by the Secretary in making decisions whether to terminate persons already receiving benefits. The Fourth Circuit followed *Patti* in *Dotson v. Schweiker,* 719 F.2d 80 (4th Cir. 1983), one of the controlling circuit court decisions on which this action has focused.

[4]The term "nonacquiescence" is used most frequently in reference to decisions by the Internal Revenue Service not to follow Court of Appeals interpretations of the Internal Revenue Code in *other* judicial circuits. The Secretary's policy of in-circuit nonacquiescence, by contrast, requires agency decisionmakers to disregard controlling decisions of the Court of Appeals of the very circuit in which those decisionmakers act and the claimant resides. *See Lopez v. Heckler,* 725 F.2d 1489, 1503 n.12 (9th Cir. 1984). (There follows a full collection of citations in *Lopez,* a nonacquiescence case to which this Court has already devoted substantial attention: 572 F. Supp. 26 (C.D. Cal. 1983) (awarding preliminary injunction granting class-wide relief), *stay denied,* 713 F.2d 1432 (9th Cir. 1983), *stay granted pending disposition by Court of Appeals,* 104 S. Ct. 10 (No. A-145, Sept. 9, 1983) (Rehnquist, J., sitting as Circuit Justice), *emergency motion to vacate stay denied,* 104 S. Ct. 221 (No. A-145, Oct. 11, 1983), *with dissenting opinions at* 104 S. Ct. 221 (Stevens, J., joined by Blackmun, J.) & 104 S. Ct. at 225 (Brennan, J., joined by Marshall, J.), *District Court's order substantially aff'd,* 725 F.2d 1489 (9th Cir. 1984), *partial stay granted pending Supreme Court review,* 104 S. Ct. 2164 (No. A-707, Apr. 30, 1984), *vacated and remanded in light of Social Security Disability Reform Act of 1984,* 105 S. Ct. 583 (No. 84-115, Dec. 10, 1984).)

The named plaintiffs claimed to be victims of the Secretary's policy. They sued on behalf of themselves and other such victims found not to be disabled and thus ineligible for Social Security Disability Insurance ("SSDI") benefits or Supplemental Security Insurance ("SSI") benefits under Titles II and XVI of the Social Security Act.

The plaintiffs challenged the Secretary's policy of non-acquiescence in general. They also challenged in particular her resulting failure to abide by three specific Fourth Circuit decisions: *Martin v. Secretary of HEW*, 492 F.2d 905 (4th Cir. 1974); *Myers v. Califano*, 611 F.2d 980 (4th Cir. 1980); and *Dotson v. Schweiker*, 719 F.2d 80 (4th Cir. 1983). In *Martin*, the Fourth Circuit held that a showing of end-organ damage (*i.e.*, injury to the brain, heart, kidneys or eyes) was not necessary to establish a disability resulting from hypertension or diabetes mellitus. 492 F.2d at 905–06, 909–10. In *Myers* and earlier cases, the Fourth Circuit held that a claimant who proves a pain-inducing condition may establish a disability based exclusively on subjective reports of the intensity and effects of the pain. 611 F.2d at 983; *see Thorne v. Weinberger*, 530 F.2d 580, 583 (4th Cir. 1976); *Mode v. Celebrezze*, 359 F.2d 135, 137 (4th Cir. 1966). In *Dotson*, the Fourth Circuit rejected the "current medical evidence" test used by the Secretary to terminate existing beneficiaries without any showing of medical improvement. 719 F.2d at 81–82.

Plaintiffs alleged that the Secretary's decision-makers were not applying the governing disability rules established in the Fourth Circuit by *Martin*, *Myers* and *Dotson* because the Secretary insisted on adherence to her own regulations, SSRs and POMS. The Secretary's actions, according to plaintiffs, violated the separation-of-powers principle and due process clause of the United States Constitution, the rule of *stare decisis*, the Administrative Procedure Act and the Social Security Act. A-62. Plaintiffs based their claim of federal court jurisdiction on 28 U.S.C. §1331, 28 U.S.C. §1361, and the Social Security

Act's judicial review provision, 42 U.S.C. §405(g). *See* A-51, 54.

The case went to trial before the Honorable James B. McMillan. After hearing the evidence, Judge McMillan found as a fact that the Secretary was pursuing a "continuing policy" of "refusal to comply with court decisions with which she disagrees." A-79. He also found that agency decision-makers in North Carolina in fact were failing to follow the holdings of *Martin, Myers* and *Dotson.* A-72–76, 85–88, 90–91. The Secretary's policy, according to Judge McMillan, violated both the principle of constitutional separation of powers, A-85–91, and the due process clause, A-91. Finding far-reaching irreparable injury, A-77, 83, Judge McMillan issued an injunction ordering the Secretary to "cease immediately her policy of refusing to follow the law of the Fourth Circuit" and to "issue written directives" instructing persons administering disability programs in North Carolina to follow Fourth Circuit standards. A-92. The injunction also ordered the Secretary to begin following the Fourth Circuit's rulings in *Martin, Myers* and *Dotson.* A-92.

By separate Order dated March 26, 1984, Judge McMillan certified a class of plaintiffs entitled to receive reconsideration of their claims by the Secretary pursuant to the standards established in *Martin, Myers* and *Dotson.* A-95.[5]

---

[5]This class comprised three subclasses: (1) those North Carolina residents whose benefits were terminated without compliance with *Dotson* after October 6, 1982; (2) those North Carolina residents whose benefits were terminated without compliance with *Martin* or without compliance with *Myers* after September 10, 1981; and (3) those North Carolina residents whose claims for initial benefits were denied without compliance with *Martin* or without compliance with *Myers* after September 10, 1981. A-95–96.

The certified class included persons whose claims had been last denied more than 60 days before the assertion of their claims in this lawsuit and also included persons who had not exhausted all levels of administrative review in pursuing their claims.[6]

The Secretary appealed to the Fourth Circuit. After oral argument in that Court, Congress enacted and President Reagan signed the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 *et seq.* (the "new Act" or "1984 Act"). A-5. The new Act did not treat the subject of hypertension and diabetes mellitus, on which the plaintiffs' *Martin* claim was based. It did, however, set forth a new statutory standard for analyzing subjective allegations of pain, thus affecting the claim based on *Myers.* 1984 Act §3. With respect to *Dotson,* the new Act included a new statutory "medical improvement" provision. *Id.* §2(a)–(c). In addition, the Act directed courts to award a new administrative review, applying this standard, to any terminee who was a "member of a class certified on or before September 19, 1984 in a class action relating to medical improvement." *See id.* §2(d)(3)(B).

---

[6]There are four levels of agency review in the making of disability determinations. *See generally Heckler v. Day,* ___ U.S. ___, 104 S. Ct. 2249, 2251 (1984). The initial determination is made by an employee of a state agency under contract with the Social Security Administration ("SSA") and bound to follow its directives. *See* 42 U.S.C. §§421(a); 1383b(a); 20 C.F.R. §§404.1503, 416.903. If the initial disability decision is adverse, the claimant may seek a *de novo* reconsideration, again before the state agency. *See* 20 C.F.R. §§404.904, 404.907 to .921, 416.1405, 416.1407 to .1421. Upon receiving an adverse reconsideration decision, the claimant may obtain review before an administrative law judge ("ALJ") in SSA's Office of Hearings and Appeals. *See* 42 U.S.C. §421(d); 42 U.S.C. §1383(c)(1); 20 C.F.R. §§404.929 to .965, 416.1429 to .1465. Finally, the claimant may seek review by the SSA's Appeals Council. *See* 20 C.F.R. §§404.967 to .983, 416.1467 to .1483.

Relying extensively on the new Act and its legislative history, the Fourth Circuit vacated the District Court's judgment and remanded with detailed instructions. A-43. The Court of Appeals did not overturn the basic determination of the District Court that the Secretary had nonacquiesced in Fourth Circuit law, including in her failure to follow *Martin*.[7] The Court of Appeals also did not question the District Court's conclusions that nonacquiescence is illegal and that the Secretary's policy was causing irreparable injury. The Court, however, cut back on the relief ordered by the District Court in two respects.

First, the Court concluded that *Heckler v. Day*, ___ U.S. ___, 104 S. Ct. 2249 (1984), and the legislative history of the 1984 Act precluded the award of injunctive relief in a nonacquiescence case. A-49–50. As a result, the Court of Appeals vacated those portions of the District Court's judgment enjoining the Secretary to discontinue her refusal to follow Fourth Circuit law and to issue notices to her decisionmakers to follow Fourth Circuit standards. A-50, 55. For the same reason, the Court vacated that portion of the District Court's judgment enjoining the Secretary to follow *Martin* in the future, including in reevaluating the claims of proper class members suffering from hypertension and diabetes. A-50, 55.[8]

---

[7]In the Court of Appeals, the Secretary challenged only the District Court's findings of nonacquiescence, while not seeking to defend the legality of the practice. In light of its other rulings, the Fourth Circuit did not focus at length on the parties' dispute over whether the Secretary had nonacquiesced. It did, however, describe the *Martin* subclass as "includ[ing] claimants whose benefits were terminated because the Secretary did not follow this circuit's precedent," A-48, and remanded the claims of initial-applicant *Martin* class members to the Secretary "for reconsideration of her policy of nonacquiescence." A-56.

[8]Instead, proper *Martin* class members were to receive a "[r]emand to the Secretary for reconsideration of her policy of nonacquiescence in light of the 1984 Act's legislative history and circuit precedent." A-56. The court also vacated the injunctions requiring compliance with *Dotson* and *Myers*, but did so because the 1984 Act superseded *Dotson*'s

Second, the Court applied in a restrictive manner the Social Security Act's judicial review provision, 42 U.S.C. §405(g), to reduce the number of initial applicants in the class entitled to new hearings. In particular, any initial applicant was excluded from class membership unless he or she fully exhausted administrative remedies and did so not more than 60 days before the assertion of the class claims for relief. A-51–53. The Court also held that initial applicants thus failing to establish jurisdiction under section 405(g) could not invoke mandamus jurisdiction under 28 U.S.C. §1361. A-20.[9]

On June 25, 1985, pursuant to the mandate of the Fourth Circuit, the District Court entered an Order providing relief to those class members recognized as entitled to relief by the Fourth Circuit. A-119. This relief is now being administered. By way of this petition, petitioners seek two things. First, they seek to secure reinstatement in the class of those persons excluded from the class by the Fourth Circuit. Second, they seek to have reinstated prospectively the injunctive relief concerning nonacquiescence in general and *Martin* in particular that was vacated by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

A. The Court Should Grant the Writ to Consider Whether Congress has Stripped the Federal Judiciary of the Power to Issue Injunctions to Remedy Nonacquiescence.

1. Federal District Courts must and do have the power to enjoin the Secretary's unconstitutional policy of nonacquiescence.

and *Myers'* treatment of medical improvement and pain. The dissolution of that portion of the injunction concerning *Dotson* and *Myers* is not challenged here.

[9]The Court held that all persons whose benefits were *terminated* and who were included in the class as certified by the District Court were entitled to reconsideration of their claims without regard to exhaustion or the 60-day rule, because section 2(d) of the new Act specifically dictated that result. A-47–48.

In *Califano v. Yamasaki*, 442 U.S. 682, 704–07 (1979), this Court unanimously upheld the power of federal courts to certify classes and to issue injunctions in Social Security cases. The District Court relied on *Yamasaki* in issuing injunctive relief in this case. A-79. The Fourth Circuit, however, vacated the District Court's award of injunctive relief in reliance on *Heckler v. Day*, ___ U.S. ___, 104 S. Ct. 2249 (1984). A-49–50, 55.

In *Day*, a closely divided Court held that prior congressional actions foreclosed one specific type of injunction in Social Security cases — namely, an injunction requiring the Secretary to comply on a statewide basis with fixed time limits for making eligibility determinations. The Court reasoned that Congress had refused to impose such limitations "almost annually" since 1975, *id.* at 2254-55; that Congress had selectively imposed time limits on Social Security decisionmakers making eligibility determinations in other contexts, *id.* at 2257; and that the legislative history even condemned recent judicial decisions imposing exactly the sort of injunction at issue in the case, *id.* at 2255-56 & n.26. The legislative materials, according to the Court, revealed "Congress's unequivocal determination that mandatory deadlines were inappropriate." *Id.* at 2258 n.32. The Court noted that "we rarely see as clear an expression of legislative intent." *Id.* at 2257 n.30.

In this case the Fourth Circuit pointed to the 1984 Act in reasoning that:

> The controversy over nonacquiescence presents an analogous situation. The conferees deleted a provision of the House bill that would have required acquiescence in circuit precedent in the absence of appeal. *See* Conference Report at 37, 130 Cong. Rec. at H9831. Following the reasoning of *Day*, we cannot approve an injunction imposing the same restraints that Congress rejected.

A-50.

In fact, this case is not remotely similar to *Day*. In *Day*, for example, Congress had endorsed the Secretary's policy

"almost annually" for a decade, 104 S. Ct. at 2254–55; the subject of nonacquiescence, however, first became a serious subject of possible legislation only as Congress framed the 1984 Act. The record in *Day* revealed focused rejection of bills specifically designed to impose fixed deadlines, *id.* at 2254 & 2255 n.23; in contrast, a Conference Committee deleted a nonacquiescence section from the 1984 Act as part of a complex compromise on a multifaceted bill that, as enacted, covered 16 different subjects. In *Day*, Congress had considered generally the subject of fixed deadlines, *id.* at 2254, 2257; here neither the House bill nor the Senate bill spoke at all to the subject of *past* decisions to nonacquiesce, which this case specifically concerns. Finally, *Day* involved injunctive relief for only a statutory violation, *id.* at 2252, while this case involves a question of constitutional rights and remedies. Each of these distinctions is substantial, but two *other* features of the new Act's legislative history negate any possible suggestion that *Day* applies here.

First, *Day* involved a situation in which Congress clearly had been persuaded by the Secretary that fixed deadlines were undesirable because they "would jeopardize the quality and uniformity of agency decisions." *Id.* at 2255; *see id.* at 2256–57 & nn.26, 29. The legislative history of the 1984 Act reveals no similar solicitude for the Secretary's policy judgment on the subject of nonacquiescence.

Both the House and Senate bills sent to the Conference Committee restricted nonacquiescence, but did so in different ways. *See* H.R. Conf. Rep. 98-1-39, 98th Cong., 2d Sess. (1984), *reprinted at* 130 Cong. Rec. at H9821, H9831 *and* 1984 U.S. Code Cong. & Admin. N. 3080, 3095.[10] The House Bill prohibited nonacquiescence in any future circuit court decision absent an appeal by the Secretary. *Id.* The Senate Bill required the Secretary to report instances of nonacquiescence to the Congress and in the

[10]That portion of the Conference Report dealing with nonacquiescence is included in the Appendix at A-16.

Federal Register, and added that "nothing in the section shall be interpreted as sanctioning any decision of the Secretary not to acquiesce in the decision of a circuit court." *Id.* In the process of producing an acceptable compromise bill, the Conference Committee finally agreed not to act *at all* on the subject of nonacquiescence. *See* 130 Cong. Rec. at H9834 (remarks of Rep. Archer). Indeed, the Committee went out of its way to make it clear that:

> The conferees do *not* intend that the agreement to drop both provisions be interpreted as approval of "non-acquiescence" by a federal agency to an interpretation of a U.S. Circuit Court of Appeals as a general practice.

130 Cong. Rec. at H9831, 1984 U.S. Code & Cong. N. at 3095 (emphasis added).

Behind the conferees' "non-approval" of nonacquiescence lay widespread skepticism and hostility toward the Secretary's policy. The Conference Report explained that "questions have been raised about the constitutional basis of nonacquiescence and many of the conferees have strong concerns about some of the ways in which this policy has been applied, even if constitutional." *Id.* at 3096. The Report went on to criticize the policy's "clearly . . . undesirable consequence" of generating repetitious appeals costly to both claimants and the government. *Id.* at 3095. It urged that, instead of nonacquiescing, the Secretary should "resolve policy conflicts promptly" either by appealing to the Supreme Court or by seeking legislative action. *Id.* Representative Pickle, who was principally responsible for the legislation in the House, reported that the Conference Report "sends a clear signal to the administration that the present policy of nonacquiescence is *not acceptable.*" 130 Cong. Rec. at H9836 (emphasis added).

This legislative record stands in stark contrast to Congress's resounding *endorsement* of the policy judgment of the Secretary revealed by the legislative record in *Day*. It is simply unreasonable to infer from the Conference Committee's actions a decision to abolish necessary judicial

remedies for victims of the very practice that the Conference Report criticized and about which "many of the conferees" had such "strong concerns." *See Steiberger v. Heckler*, 84 CIV 1302 (LBS) (S.D.N.Y. Aug. 19, 1985), slip op. 114–15.

Second and even more importantly, Congress, in electing not to legislate on the subject, recognized and relied on the continuing authority of the judiciary to respond to the Secretary's policy of nonacquiescence. 130 Cong. Rec. at H9831, 1984 U.S. Code Cong. & Admin. N. at 3095. Even the less restrictive Senate proposal retained full authority in the courts to deal with nonacquiescence by expressly *not* "sanctioning any decision . . . not to acquiesce." *Id.* The Senate took this approach because "if a constitutional issue is involved, it *cannot* be settled in this legislation." Sen. Rep. 98-466, 98th Cong., 2d Sess. at p.21 (May 18, 1984) (emphasis added). The Conference Committee gave an even more explicit indication of deference to the judiciary when it observed that:

> The conferees also feel that in addition to the practical administrative problems which may be raised by nonacquiescence, *the legal and Constitutional issues raised by non-acquiescence can only be settled by the Supreme Court.*

130 Cong. Rec. at H9831; 1984 U.S. Code Cong. & Admin. N. at 3096 (emphasis added); *see also* 130 Cong. Rec. at 9834 (remarks of Rep. Archer).

As these statements indicate, Congress distinguished between "the practical administrative problems" raised by nonacquiescence and "the legal and Constitutional issues" presented by the Secretary's policy. Congress considered legislating with respect to the practical problems but ultimately decided only to "jawbone" the Secretary about these problems in the Conference Report. In contrast, Congress consistently disclaimed any intention to intervene on the "legal and Constitutional issues" committed to the judiciary. It makes no sense to find a contraction of

the judicial power when Congress recognized and relied on the courts' ability to exercise that power.

"Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction." *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979); *see generally Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). This rule obviously applies with special force when constitutional rights are at stake. *See, e.g., Califano v. Sanders*, 430 U.S. 99, 109 (1977).[11] Applying any test, however, there is no reasonable way to infer from this legislative history a congressional intent to withdraw the

[11]In an analogous context, this Court has refused to find a congressional displacement of a constitutional damages remedy unless "Congress has provided an alternative remedy which it has *explicitly declared* to be a substitute for recovery . . . and viewed as equally effective." *Carlson v. Green*, 446 U.S. 14, 18–19 (1980) (emphasis added). *A fortiori*, "an explicit congressional declaration," *Davis v. Passman*, 442 U.S. 228, 246–47 (1979), should at a minimum be required to defeat the generally available constitutional remedy of enjoining wrongs found to threaten irreparable harm. *See Carlson, supra*, 446 U.S. at 42–44 (Rehnquist, J., dissenting).

judicial power to issue injunctions in nonacquiescence cases.[12]

2. The Court of Appeals' decision to vacate the injunction to follow *Martin* is especially objectionable.

The Court of Appeals' reading of *Day* led it to vacate even that portion of the District Court's injunction requiring the Secretary to comply with the Social Security Act as interpreted in *Martin*. This aspect of the Fourth Circuit's decision creates a profound anomaly that makes its decision especially objectionable.

Based on overwhelming evidence, the District Court found as a fact that agency decisionmakers were applying the Secretary's directives to reject disability claims based on hypertension or diabetes mellitus unless those conditions were accompanied by end-organ damage. A-73. This practice was and is flatly inconsistent with the dictates of the Social Security Act as interpreted in *Martin v. Califano, supra*. Finding widespread irreparable injury, A-77, 83, the Court enjoined this illegal practice by ordering the Secretary to "begin immediately to follow the law of the Fourth Circuit within North Carolina as it is expressed in *Martin* . . . ." A-92. Stated otherwise, the Court ordered the Secretary to "stop denying claims for Social Security disability benefits based on hypertension or diabetes mellitus upon the theory that without end-organ damage (to the heart, eyes, kidneys or brain), the claimant does not have a 'severe impairment.'" A-58.

Apart from any controversy over nonacquiescence, this injunction plainly would have been proper under *Yamasaki*. The Fourth Circuit, however, vacated this injunction because the Secretary's practice *resulted from*

---

[12]Not even the Secretary advocated the reading of the new Act created by the Fourth Circuit, despite her filing of an extensive Supplemental Brief and Reply Brief in that Court detailing her views of the new Act's effect on this case. The Fourth Circuit's novel and sweeping reliance on *Day* and the legislative history of the 1984 Act was developed entirely *sua sponte*.

her policy of nonacquiescence — that is, her intentional refusal to heed the existing and controlling decision in *Martin*. A-50. This result makes no sense. If courts can enjoin violations of the Social Security Act as a general matter, they must be able to enjoin violations of the Act resulting from the Secretary's flagrant persistence in conduct already held to be unlawful in a controlling circuit court decision. In this case, however, the Fourth Circuit vacated just such an injunction.

In vacating the District Court's injunction, the Fourth Circuit committed patent error. This Court should grant the writ to review the Fourth Circuit's dangerous and anomalous extension of *Heckler v. Day*.[13]

3. Whether courts retain the power to enjoin nonacquiescence is a matter of extraordinary importance to the federal judiciary and disabled citizens throughout the nation.

The Secretary's policy of nonacquiescence has raised one of the most visible and significant constitutional issues of the present day. The Fourth Circuit's holding that courts may not halt the Secretary's practice wars with the fundamental tenet that "it is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803). Its ruling also conflicts with a recent and comprehensive decision specifically concluding that the Fourth Circuit erred in applying the 1984 Act. *Steiberger v. Heckler, supra*, slip op. at 113–17 ("*Hyatt* and *Day* are not analogous").

---

[13]Indeed, plaintiffs submit that the lower court's misapplication of *Day* is so clear that this Court should consider either summarily reversing or vacating and remanding for full consideration of the legislative history of the 1984 Act, after the parties have been given an adequate opportunity to address this important issue. *See* note 12 *supra*.

The Fourth Circuit's dissolution of the District Court's injunction is of acute human significance to Social Security claimants throughout North Carolina and the Fourth Circuit. The question whether courts can issue injunctions to remedy nonacquiescence is also of pressing importance generally. Thus, although the Secretary has announced a complex modification of her nonacquiescence policy at the ALJ and Appeals Council levels, *see* Interim Circular No. 185 (A-35), decisionmakers at the initial-decision and reconsideration levels remain obligated to follow the Secretary's pronouncements regardless of circuit court law. *See, e.g.*, Social Security Forum, Vol. 7, No. 6 (June 1985) (noting acting Commissioner's acknowledgment of continued nonacquiescence at these levels); *Steiberger v. Heckler, supra,* slip op. at 102-03 (collecting similar testimony). Non-acquiescence at these levels is of the greatest practical importance, since all claims are initially resolved in these proceedings and many, if not most, are finally resolved there. *Id.* at 103. The American Bar Association has recently resolved that it "urges the Social Security Administration to observe, *in all stages of administrative proceedings,* the applicable decisions of the United States Court of Appeals for the circuit in which the matter has arisen, subject to the agency seeking review in the United States Supreme Court." American Bar Association Resolution, passed July 10, 1985 (emphasis added), *reprinted at* A-41. These factors, in addition to the extraordinary extension of this Court's *Day* decision by the Court of Appeals, indicate that the Writ should issue in this case.

B. The Court Should Grant the Petition to Consider Important Issues Dividing the Circuits in the Application of the Social Security Act's Judicial Review Provisions.

For a person to qualify as a member of a plaintiff class in a Social Security case, his or her individual claim must be properly before the court. *E.g., Califano v. Yamasaki,* 442 U.S. 682, 701 (1979); *Weinberger v. Salfi,* 422 U.S. 749, 763–764 (1975). Persons asserting claims "arising

under" the Social Security Act may *not* base their claims on federal-question jurisdiction under 28 U.S.C. §1331. *E.g., Heckler v. Ringer,* ___ U.S. ___, 104 S. Ct. 2013, 2021–2022 (1984). The reason is that the Social Security Act expressly precludes such jurisdiction, 42 U.S.C. §405(h), and sets forth its own judicial-review provision, 42 U.S.C. §405(g). Section 405(g) provides:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow.

Relying on *Mathews v. Eldridge,* 424 U.S. 319 (1976), the District Court concluded that this was the type of case in which full exhaustion was not required to secure a "final decision" subject to judicial review. A-80–84. It also concluded that the 60-day rule of section 405(g) was not strictly applicable in this action challenging purposeful in-circuit nonacquiescence. A-97–98. The Fourth Circuit overturned the District Court's rulings on both these points, and also held that mandamus jurisdiction was unavailable to claimants not strictly complying with section 405(g). A-51–54. The Court of Appeals' holding on all three of these issues conflicts with decisions of other circuits. In addition, the panel's holding that the 60-day rule is jurisdictional directly conflicts with prior pronouncements of this tribunal. These issues are of extraordinary importance. Indeed, the Secretary has estimated that their resolution affects some 56,000 persons in this case alone. A-128. For these reasons, these issues warrant full review by this Court.[14]

---

[14]In his pending Petition for Certiorari in *Heckler v. Polaski,* No. 85-55 (filed July 11, 1985), the Acting Solicitor General urges that that case "plainly warrants" review because the Eighth Circuit's interpretation of section 405(g) conflicts with the holding in this case and affects

1. The Court should grant the writ to consider whether the 60-day rule of section 405(g) is jurisdictional or a statute of limitations.

Section 405(g) states that a Social Security claimant who receives a "final decision of the Secretary" may "obtain a review . . . by civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow." A fundamental issue in this case, of obviously sweeping significance, is whether this 60-day provision imposes a jurisdictional limitation on the power of courts or whether it is in the nature of a statute of limitations, subject to such doctrines as waiver and equitable tolling. This Court spoke to this issue in *Weinberger v. Salfi*, 422 U.S. 749 (1975), when it held that the 60-day requirement "specif[ies] . . . a *statute of limitations,*" which the Secretary was bound to plead as an *affirmative defense* pursuant to Fed. R. Civ. P. 8(c). *Id.* at 764 (emphasis added). *Compare* Fed. R. Civ. P. 12(b)(1) (providing for pleading of subject matter jurisdiction defense). The 60-day rule thus stood in contrast to the first requirement of a "final decision," which alone was deemed "central to the requisite grant of *subject matter jurisdiction.*" *Id.* at 764 (emphasis added). In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court reaffirmed that the 60-day rule constitutes "a statute of limitations" to be pleaded as an affirmative defense. *Id.* at 328 n.9. *See also Heckler v. Day*, ___ U.S. ___, 104 S. Ct. 2249, 2253 n.14 (1984); *Heckler v. Ringer*, ___ U.S. ___, 104 S. Ct. 2013, 2033 n.25 (1984) (Stevens, J., dissenting).

Notwithstanding these controlling authorities, the Fourth Circuit in *Hunt v. Schweiker*, 685 F.2d 121 (4th Cir. 1982), concluded that the 60-day rule is *not* a statute of limitations. As stated by the Court in that case:

> Whether the 60-day filing requirement of §[405(g)] may be tolled or is a prerequisite to stating a claim

some 9,000 Social Security claims. *Id.* at 12. That logic applies *a fortiori* here.

> depends upon whether it is jurisdictional or a statute of limitations. We find that the 60-day requirement is jurisdictional . . . .

Id. at 123. Even though the panel in *Hunt* did not mention *Salfi* or *Mathews,* the panel in this case felt compelled to follow *Hunt.* A-52. Its ruling that the 60-day rule is jurisdictional conflicts not only with *Salfi* and *Mathews,* but with the decisions of at least six Courts of Appeals and numerous District Courts.[15] Moreover, the Fourth Circuit's construction of section 405(g) threatens dire consequences for many claimants seeking judicial review because it makes unavailable to them all traditional rules of tolling except as permitted in the unfettered discretion of the Secretary. No tolling rule applies, for example, even if the plaintiff refrains in good faith from bringing a duplicative suit in reliance on his membership in a class that is later decertified. *See Hunt, supra.*[16]

---

[15]*See City of New York v. Heckler,* 742 F.2d 729, 737–738 (2d Cir. 1984), *petition for rehearing denied,* 755 F.2d 31 (2d Cir. 1985), *petition for certiorari pending,* No. 84–1923 (filed June 7, 1985); *Rowland v. Califano,* 588 F.2d 449,550 n.2 (5th Cir. 1979); *Johnson v. Heckler,* Nos. 85–1254, 85–1496 (7th Cir., July 30, 1985); *Mental Health Association v. Heckler,* 720 F.2d 965, 967, 973 n.19 (8th Cir. 1983); *Lopez v. Heckler,* 725 F.2d 1489, 1504–1507 (9th Cir. 1984), *with subsequent history set forth in* note 4 *supra; Hatchell v. Heckler,* 708 F.2d 578, 580 n.1 (11th Cir. 1983); *see also, e.g., Holden v. Heckler,* 584 F. Supp. 463, 483–84 (N.D. Ohio 1984); *Graham v. Heckler,* 573 F. Supp. 1573 (N.D. W. Va. 1983); *Kennedy v. Harris,* 87 F.R.D. 372 (S.D. Cal. 1980). *But see Whipp v. Weinberger,* 505 F.2d 800, 801 (6th Cir. 1974). Referring to the Fourth Circuit's decision in this case, the Solicitor General has recognized this conflict in the circuits. *See* Petition for Certiorari in *Heckler v. City of New York, supra,* at p. 29.

[16]In this case too there is good cause for applying a tolling rule: first, by analogy to the class-representative notice rule applicable in Title VII context, *see Lopez v. Heckler,* 725 F.2d at 1506–07, *citing Albemarle Paper Co. v. Moody,* 422 U.S. 405, 415 n.8 (1975); second, because the Secretary's policy of nonacquiescence involves a misleading of claimants, who have no reason to doubt that their claims have been denied based on a good-faith review honestly conducted in

In *Heckler v. Lopez*, ___ U.S. ___, ___, ___, 104 S. Ct. 10, 221, 2164 (1983), this Court twice stayed relief awarded to persons not strictly meeting the 60-day limitation, but its opportunity to speak definitively to the nature of the 60-day rule was removed by the passage of the 1984 Act. *See* 105 S. Ct. 583. The Secretary, however, has since sought review of two other decisions squarely presenting the question whether the 60-day rule is jurisdictional and squarely conflicting with the Fourth Circuit's resolution of that issue in this case. *Heckler v. City of New York*, No. 84-1923, Petition for Certiorari at 24–25 (filed June 7, 1985); *Heckler v. Owens*, No. 85-31, Jurisdictional Statement at 23–25 (filed July 5, 1985). The Court should grant the writ in this case to consider the important question whether the 60-day rule is jurisdictional.

2. The Court should grant the petition to resolve a conflict in the circuits on the question whether exhaustion is required whenever plaintiffs challenge improper eligibility standards and, in particular, when they challenge the Secretary's policy of nonacquiescence.

Under section 405(g), a Social Security claimant may seek judicial review from only a "final decision" of the Secretary. This Court has explained that this "final decision" requirement has two parts. First, a claimant must present a claim to the Secretary for action by her. This requirement is mandatory and non-waivable. *Mathews v. Eldridge*, 424 U.S. 319, 328 (1976). Second, the claimant must normally exhaust his or her claim through each of the four levels of administrative review. *See* note 6, *supra*. This requirement, in contrast to the first, may be excused by the Secretary or by the courts. 424 U.S. at 328. In *Eldridge*, for example, this Court waived exhaustion, even over the Secretary's objection, where a former Social Security recipient challenged the failure to afford him a

compliance with settled law, *see City of New York v. Heckler*, 742 F.2d at 738; and third, because it is inequitable to let the Secretary exploit unusually strict procedural limitations to shield her flouting of controlling law from a judicial remedy, *Lopez v. Heckler*, 725 F.2d at 1506.

pretermination hearing. Endorsing an "intensely 'practical' approach" and citing the risk of loss of "collateral claims," *id.* at 331 n. 11, the Court found that "deference to the agency's judgment is inappropriate." *Id.* at 330.

The Court most recently applied these principles in *Heckler v. Ringer, supra.* In that case, four individual plaintiffs challenged the Secretary's direction to her subordinates not to reimburse Medicaid recipients for bilateral carotid body resections ("BCBRs"). This directive, however, did not apply at the ALJ level (*i.e.*, the third tier of administrative review), except as to BCBRs performed after October 28, 1980.

One plaintiff in *Ringer* had never had a BCBR. As to him, the Court concluded that the nonwaivable requirement of *presenting* a reimbursement claim was not satisfied since he had no claim to present. 104 S. Ct. at 2025. The other three plaintiffs had had the procedure performed before October 28, 1980, but had not exhausted administrative remedies. As to these plaintiffs, the Court concluded that excusing exhaustion was inappropriate for two reasons. First, these plaintiffs' claims were not "wholly 'collateral' to their claim for benefits," *id.* at 2023, since each was seeking a judicial order requiring "at bottom," *id.* at 2021, and "essentially," *id.* at 2024, reimbursement for his BCBR. Second, exhaustion was "in no sense futile," *id.* at 2024, since the challenged policy was not even applicable to these plaintiffs' claims at the ALJ level, and ALJs had granted reimbursement "overwhelmingly" in just such cases. *Id.* at 2019. While requiring exhaustion, the Court reaffirmed that "in certain special cases, deference to the Secretary's conclusion as to the utility of pursuing the claim through administrative channels is not always appropriate." *Id.* at 2023.

The Fourth Circuit in this case read *Ringer* to require exhaustion by all plaintiffs because they were asserting "a claim that the Secretary was applying an improper standard for entitlement." A-51. *Ringer,* however, in no way

holds that every challenge involving an "improper standard for entitlement" requires exhaustion regardless of fairness and futility.

At least two Justices have rejected this contention, *Heckler v. Lopez,* 104 S. Ct. 221, 224 (1983) (Stevens, J., joined by Blackmun, J., dissenting from denial of motion to vacate stay), and there is some indication that a majority of the Court shares this point of view.[17] At least four separate post-*Ringer* decisions have also excused exhaustion by plaintiffs challenging improper standards for entitlement. *City of New York v. Heckler,* 742 F.2d 729, 736–37 (2d Cir. 1984), *petition for rehearing denied,* 755 F.2d 31 (2d Cir. 1985), *petition for certiorari pending,* No. 84-1923 (filed June 7, 1985); *Polaski v. Heckler,* 751 F.2d 943, 951–53 (8th Cir. 1984), *petition for certiorari pending,* No. 85-55 (filed July 11, 1985); *Johnson v. Heckler,* ___ F.2d ___, Nos. 85-1254 & 85-1490 (7th Cir. July 30, 1985); *Owens v. Heckler,* CV 83-2436-WMB (C.D. Cal. 1984), *appeal pending,* No. 85-31 (filed July 5, 1985). Moreover, one of these decisions — now pending before this Court — involved exactly the same pain standard challenged in this action. *Polaski v. Heckler, supra.* In many pre-*Ringer* cases, courts also excused exhaustion where plaintiffs attacked misapplication of eligibility rules. *E.g., Lopez v. Heckler,* 725 F.2d at 1503; *Kuehner v. Schweiker,* 717 F.2d 813 (3d Cir. 1983), *vacated and remanded on other grounds,* 105 S. Ct. 376 (1984). These decisions reflect a conflict with the Fourth Circuit's decision in this case, and the respondent so recognizes. *See, e.g., City of New York, supra,* Petition for Certiorari at 24

---

[17]In *Lopez,* the Ninth Circuit had affirmed the District Court's award of relief to a plaintiff class that claimed that an improper standard for entitlement — *viz,* the current medical evidence standard, rather than the medical improvement standard — had been applied to them. This Court granted the Secretary's request to stay relief to persons not complying with the 60-day rule, but simultaneously *denied* her request to stay relief to persons who had not exhausted. *See* 104 S. Ct. 2164. *Lopez,* like this case and unlike *Ringer,* involved nonacquiescence.

("*Polaski* and the instant case squarely conflict on the exhaustion issue with *Hyatt v. Heckler* . . . .").

As these authorities indicate, the Fourth Circuit read *Ringer* too broadly. In *Johnson*, for example, the Seventh Circuit excused exhaustion by plaintiffs challenging a fixed rule under which the Secretary refused to consider vocational factors in the absence of a "severe impairment." The Court reasoned that the plaintiffs' claims were "demonstrably more collateral" than those in *Ringer*, because a favorable ruling would not result in benefits, but merely provide hearings in which proper standards were applied. *Johnson, supra*, slip op. at 9. Similarly, exhaustion was "more futile" than in *Ringer* because "the Secretary's published policies are not likely to be influenced or changed by the administrative appeals of any single individual; thus the issue is unsuited to resolution in the hearing process." *Id.* at 9-10. These same considerations fully apply here. *See* A-84.

More importantly, however, *Ringer* does not control this case because *Ringer* did not involve nonacquiescence. *Compare Lopez, supra*, 725 F.2d at 1501-03; *Kuehner, supra*, 717 F.2d at 824 (Becker, J., concurring). There is simply no reason to defer to agency "experience and expertise" or to give the agency "an opportunity to correct its own errors," *Weinberger v. Salfi, supra*, 422 U.S. at 765, when the need for relief springs from the agency's policy of systematically choosing to err by refusing to follow settled circuit court law. Indeed, honoring the exhaustion requirement in nonacquiescence cases works a "perversion of the administrative and judicial system," *Lopez, supra*, 725 F.2d at 1503, by *facilitating* the Secretary's flouting of controlling judicial authority and her wearing down of claimants by subjecting them to repeated proceedings conducted in conscious violation of the law.

It is the right to be free from the Secretary's unconstitutional abuse of the administrative review process that plaintiffs seek to assert in challenging nonacquiescence. If plaintiffs must endure that process to assert that right,

then the Secretary necessarily will achieve her unlawful purpose, the claimed right *ipso facto* will be defeated, and the plaintiffs will suffer "potentially irreparable injuries." *Mathews v. Eldridge*, 424 U.S. at 331 n.11; *see also Lopez, supra*, 725 F.2d at 1502 n.11 ("separation-of-powers issue is entirely collateral to the substantive claim for disability benefits").

Ringer did not address the question whether exhaustion is required in a nonacquiescence case. To resolve this important question and a conflict in the circuits, the Court should grant this petition.

3. The Court should grant certiorari to consider whether mandamus jurisdiction is available in a nonacquiescence case if jurisdiction under section 405(g) is not.

Lower courts uniformly have held that mandamus jurisdiction under 28 U.S.C. §1361 is available in appropriate Social Security cases.[18] Contrary to these many holdings, the Secretary is now urging the Court to hold that section 405(h) invariably precludes the exercise of mandamus jurisdiction in such cases. *See Heckler v. City of New York*, No. 84-1923, Petition for Certiorari at 28 (filed June 7, 1985).

On repeated occasions this Court has noted and reserved the question whether mandamus jurisdiction is ever available to a plaintiff asserting a Social Security-related claim. *Califano v. Yamasaki*, 442 U.S. 682,

---

[18] *E.g., Ganem v. Heckler*, 746 F.2d 844, 850-52 (D.C. Cir. 1984) (citing "unfractured consensus in the Courts of Appeals"); *Ellis v. Blum*, 643 F.2d 68, 81 (2d Cir. 1981); *Kuehner v. Schweiker*, 717 F.2d 813, 819 (3d Cir. 1983), *vacated and remanded on other grounds*, 105 S. Ct. 376 (1984); *Starnes v. Schweiker*, 715 F.2d 134, 141–42 (4th Cir. 1983), *vacated on other grounds sub nom. Starnes v. Heckler*, ___ U.S. ___, 104 S. Ct. 2673 (1984); *Mental Health Ass'n v. Heckler*, 720 F.2d 965, 971 n.17 (8th Cir. 1983); *Elliott v. Weinberger*, 564 F.2d 1219, 1227 (9th Cir. 1977), *aff'd in part on other grounds sub nom. Califano v. Yamasaki*, 442 U.S. 682 (1979); *Ryan v. Shea*, 525 F.2d 268, 271-72 (10th Cir. 1975).

697–98 (1979); *Norton v. Mathews*, 427 U.S. 524, 529–30 (1976); *Mathews v. Eldridge*, 424 U.S. 319, 332 n.12 (1976). In *Ringer*, for example, the Court avoided the issue by holding that mandamus jurisdiction was not available in any event because the particular claimants in that case had an "adequate remedy in §405(g)." 104 S. Ct. at 2023.

The Fourth Circuit applied this same "adequate remedy" analysis in this case. Other courts, however, have held that section 405(g) does not afford an *adequate* remedy in nonacquiescence cases if exacting compliance with that section's procedural limitations is required. *Kuehner v. Schweiker*, 717 F.2d at 819, 827 (Becker, J., concurring); *Lopez v. Heckler, supra*, 725 F.2d at 1508; *Rivera v. Heckler*, 568 F. Supp. 235, 243 (D.N.J. 1983); *Holden v. Heckler*, 584 F. Supp. 463, 484 (N.D. Ohio 1984); *Polaski v. Heckler*, 585 F. Supp. 1004, 1006 (D. Minn. 1984), *aff'd on other grounds*, 751 F.2d 943 (8th Cir. 1984), *petition for certiorari pending*, No. 85-55 (filed July 11, 1985). Similarly, in *City of New York v. Heckler, supra*, the Second Circuit upheld mandamus jurisdiction where "class members who permitted their administrative or judicial remedies to expire were entitled to believe that their Government's determination of eligibility was the considered judgment of an agency faithfully executing the laws." *Id.* at 738, 739.

The analysis underlying these cases makes good sense. As the Ninth Circuit has observed, application of the Secretary's nonacquiescence policy *necessarily* will produce a reversal if and when the claimant wends his way in timely fashion through four levels of agency review and then sues in federal district court within 60 days. It follows that:

> Only procedural flaws in claimants' challenges offer [the Secretary] any hope of success in such courts. Thus, as we have noted above, the Secretary appears to be using the procedural requirements as a mechanism for evading the law she is required to apply.

Lopez v. Heckler, 725 F.2d at 1506. The Secretary should not be able to invoke the strict procedural limitations of section 405(g) to capitalize on her policy of nonacquiescence at the expense of the unsuspecting and disabled.

CONCLUSION

For the reasons set forth above, the Court should grant this petition and afford full review in this case. Moreover, the Court should consider the merits in this case even if it grants the petition in *City of New York* or notes probable jurisdiction in *Owens*.[19] This case, unlike those, is based on the Secretary's policy of in-circuit nonacquiescence. It follows that the jurisdictional questions in this case will not necessarily be controlled by any decision in those cases. Even more significantly, the distinct issue concerning judicial power to issue injunctions in nonacquiescence cases independently warrants review by this Court.

---

[19]The Secretary has not requested plenary review in *Polaski*. See *Heckler v. Polaski, supra*, Petition for Certiorari at 13.

Respectfully submitted,

JOHN R. WESTER
(Counsel of Record)

DAN T. COENEN

ROBINSON, BRADSHAW & HINSON, P.A.
1900 Independence Center
Charlotte, North Carolina 28246
(704) 377-2536

CHARLES MCBRAYER SASSER

LEGAL SERVICES OF SOUTHERN PIEDMONT, INC.
6th Floor
951 South Independence Blvd.
Charlotte, North Carolina 28202
(704) 376-1608

Attorneys for Petitioners

Dated: September 18, 1985.

85-474 (2)

Supreme Court, U.S.
FILED
SEP 19 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PATRICK M. HYATT, HERMAN O. CAUDLE and MARY P. LOVINGOOD, on behalf of themselves and all others similarly situated,

Petitioners,

v.

MARGARET M. HECKLER, or her successors in office, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent

and

NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DISABILITY DETERMINATION SERVICES,

Intervenor-Nominal Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION

JOHN R. WESTER
(Counsel of Record)
DAN T. COENEN
ROBINSON, BRADSHAW & HINSON, P.A.
1900 Independence Center
Charlotte, North Carolina 28246
(704) 377-2536

CHARLES MCBRAYER SASSER
LEGAL SERVICES OF SOUTHERN PIEDMONT, INC.
6th Floor, 951 South Independence Boulevard
Charlotte, North Carolina 28202
(704) 376-1608

Attorneys for Petitioner

131PP

TABLE OF CONTENTS

	Page
CONSTITUTIONAL PROVISIONS	1
Article III, Section 1	
Article II, Section 3	
Amendment V	
STATUTES AND REGULATIONS	2
42 U.S.C. Section 405(g)	2
42 U.S.C. Section 405(h)	4
28 U.S.C. Section 1361	4
28 U.S.C. Section 1651(a)	4
Pub. L. 98-460, 98 Stat. 1794	5
H. R. Conference Report 98-1-39	16
20 C.F.R. Section 404.1529	20
20 C.F.R. Section 404.1633(b)	20
20 C.F.R. Section 416.1041(b)	20
20 C.F.R. Subpart P, App. 1, Section 4.00C	20
SOCIAL SECURITY ADMINISTRATION REGULATIONS	21
From SSR 82-55	21
From SSR 82-58	22
SSR 81-6	23
SSR 82-49c	25
SSR 82-64	28
HHS/SSA Interim Circular 185	35
AMERICAN BAR ASSOCIATION REPORT 110	41
ORDER OF SUPREME COURT OF UNITED STATES EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI	42
DECISION OF UNITED STATES COURT OF APPEALS, MARCH 20, 1985	43
ORDER OF UNITED STATES COURT OF APPEALS DENYING PETITIONS OF REHEARING IN BANC	57
FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION OF UNITED STATES DISTRICT COURT, FEBRUARY 14, 1984	58

	Page
JUDGMENT OF UNITED STATES DISTRICT COURT, FEBRUARY 14, 1984	92
ORDER OF UNITED STATES DISTRICT COURT CERTIFYING A CLASS AND REQUIRING NOTICE	95
AMENDED ORDER OF UNITED STATES DISTRICT COURT ALLOWING ATTORNEYS' FEES	102
AFFIDAVIT OF JEAN HALL HINCKLEY	113
ORDER OF UNITED STATES DISTRICT COURT FOLLOWING REMAND BY UNITED STATES COURT OF APPEALS, JUNE 25, 1985	119
DEFENDANT'S OPPOSITION TO PLAINTIFFS' SECOND MOTION FOR ATTORNEY FEES	128

CONSTITUTION OF THE UNITED STATES

Article III, Section 1: The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Article II, Section 3: [The President] shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Amend. V: No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

42 U.S.C. § 405(g): Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after

hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings off act and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

42 U.S.C. § 405(h): The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of a fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 1331 or 1346 or Title 28 to recover on any claim arising under this subchapter.

28 U.S.C. § 1361: The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. § 1651(a): The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STANDARD OF REVIEW FOR TERMINATION OF DISABILITY BENEFITS AND PERIODS OF DISABILITY

SEC. 2. (a) Section 223(f) of the Social Security Act is amended to read as follows:

"Standard of Review for Termination of Disability Benefits

"(f) A recipient of benefits under this title or title XVIII based on the disability of any individual may be determined not to be entitled to such benefits on the basis of a finding that the physical or mental impairment on the basis of which such benefits are provided has ceased, does not exist, or is not disabling only if such finding is supported by —

"(1) substantial evidence which demonstrates that —

"(A) there has been any medical improvement in the individual's impairment or combination of impairments (other than medical improvement which is not related to the individual's ability to work), and

"(B)(i) the individual is now able to engage in substantial gainful activity, or

"(ii) if the individual is a widow or surviving divorced wife under section 202(e) or a widower or surviving divorced husband under section 202(f), the severity of his or her impairment or impairments is no longer deemed, under regulations prescribed by the Secretary, sufficient to preclude the individual from engaging in gainful activity; or

"(2) substantial evidence which —

"(A) consists of new medical evidence and (in a case to which clause (ii)(II) does not apply) a new assessment of the individual's residual functional capacity, and demonstrates that —

"(i) although the individual has not improved medically, he or she is nonetheless a beneficiary of advances in medical or vocational therapy or thechnology (related to the individual's ability to work), and

"(ii)(I) the individual is now able to engage in substantial gainful activity, or

"(II) if the individual is a widow or surviving divorced wife under section 202(e) or a widower or surviving divorced husband under section 202(f), the severity of his or her impairment or impairments is no longer deemed under regulations prescribed by the Secretary sufficient to preclude the individual from engaging in gainful activity, or

"(B) demonstrates that —

"(i) although the individual has not improved medically, he or she has undergone vocational therapy (related to the individual's ability to work), and

"(ii) the requirements of subclause (I) or (II) of subparagraph (A)(ii) are met; or

"(3) substantial evidence which demonstrates that, as determined on the basis of new or improved diagnostic techniques or evaluations, the individual's impairment or combination of impairments is not as disabling as it was considered to be at the time of the most recent prior decision that he or she was under a disability or continued to be under a disability, and that therefore —

"(A) the individual is able to engage in substantial gainful activity, or

"(B) if the individual is a widow or surviving divorced wife under section 202(e) or a widower or surviving divorced husband under section 202(f), the severity of his or her impairment or impairments is not deemed under regulations prescribed by the Secretary sufficient to preclude the individual from engaging in gainful activity; or

"(4) substantial evidence (which may be evidence on the record at the time any prior determination of the entitlement to benefits based on disability was made, or newly obtained evidence with relates to that determination) which demonstrates that a prior determination was in error.

Nothing in this subsection shall be construed to require a determination that a recipient of benefits under this title or title XVIII based on an individual's disability is entitled to such benefits if the prior determination was fraudulently obtained or if the individual is engaged in substantial gainful activity (or gainful activity in the case of a widow, surviving divorced wife, widower, or surviving divorced husband), cannot be located, or fails, without good cause, to cooperate in a review of the entitlement to such benefits or to follow prescribed treatment which would be expected to restore his or her ability to engage in substantial gainful activity (or gainful activity in the case of a widow, surviving divorced wife, widower, or surviving divorced husband). Any determination under this section shall be made on the basis of all the evidence available in the individual's case file, including new evidence concerning the individual's prior or current condition which is presented by the individual or secured by the Secretary. Any determination made under this section shall be made on the basis of the weight of the evidence and on a neutral basis with regard to the individual's condition, without any initial inference as to the presence or absence of disability being drawn from the fact that the individual has previously been determined to be disabled. For purposes of this subsection, a benefit under this title is based on an individual's disability if it is a disability insurance benefit, a child's, widow's, or widower's insurance benefit based on disability, or a mother's or father's insurance benefit based on the disability of the mother's or father's child who has attained age 16."

(b) Section 216(i)(2)(D) of such Act is amended by adding at the end thereof the following: "The provisions set forth in section 223(f) with respect to determinations of whether entitlement to benefits under this title or title XVIII based on the disability of any individual is terminated (on the basis of a finding that the physical or mental impairment on the basis of which such benefits are provided has ceased, does not exist, or is not disabling) shall apply in ths same manner and to the same extent with respect to determinations of whether a period of disability has ended (on the basis of a finding that the physical or mental impairment on the basis of which the finding of disability was made has ceased, does not exist, or is not disabling)."

(c) Section 1614(a) of such Act is amended by adding at the end thereof the following new paragraph:

"(5) A recipient of benefits based on disability under this title may be determined not to be entitled to such benefits on the basis of a finding that the physical or mental impairment on the basis of which such benefits are provided has ceased, does not exist, or is not disabling only if such finding is supported by —

"(A) substantial evidence which demonstrates that —

"(i) there has been any medical improvement in the individual's impairment or combination of impairments (other than medical improvement which is not related to the individual's ability to work), and

"(ii) the individual is now able to engage in substantial gainful activity; or

"(B) substantial evidence (except in the case of an individual eligible to receive benefits under section 1619) which —

"(i) consists of new medical evidence and a new assessment of the individual's residual functional capacity, and demonstrates that —

"(I) although the individual has not improved medically, he or she is nonetheless a beneficiary of advances in medical or vocational therapy or technology (related to the individual's ability to work), and

"(II) the individual is now able to engage in substantial gainful activity, or

"(ii) demonstrates that —

"(I) although the individual has not improved medically, he or she has undergone vocational therapy (related to the individual's ability to work), and

"(II) the individual is now able to engage in substantial gainful activity; or

"(C) substantial evidence which demonstrates that, as determined on the basis of new or improved diagnostic techniques or evaluations, the individual's impairment or combination of impairments is not as disabling as it was considered to be at the time of the most recent prior decision that he or she was under a disability or continued to be under a disability, and that therefore the individual is able to engage in substantial gainful activity; or

"(D) substantial evidence (which may be evidence on the record at the time any prior determination of the entitlement to benefits based on disability was made, or newly obtained evidence with relates to that determination) which demonstrates that a prior determination was in error.

Nothing in this paragraph shall be construed to require a determination that an individual receiving benefits based on disability under this title is entitled to such benefits if the prior determination was fraudulently obtained or if the individual is engaged in substantial gainful activity, cannot be located, or fails, without good cause, to cooperate in a review of his or her entitlement or to follow prescribed treatment which would be expected to restore his or her ability to

engage in substantial gainful activity. Any determination under this paragraph shall be made on the basis of all the evidence available in the individual's case file, including new evidence concerning the individual's prior or current condition which is presented by the individual or secured by the Secretary. Any determination made under this paragraph shall be made on the basis of the weight of the evidence and on a neutral basis with regard to the individual's condition, without any initial inference as to the presence or absence of disability being drawn from the fact that the individual has previously been determined to be disabled."

(d)(1) The amendments made by this section shall apply only as provided in this subsection.

(2) The amendments made by this section shall apply to —

(A) determinations made by the Secretary on or after the date of the enactment of this Act;

(B) determinations with respect to which a final decision of the Secretary has not yet been made as of the date of the enactment of this Act and with respect to which a request for administrative review is made in conformity with the time limits, exhaustion requirements, and other provisions of section 205 of the Social Security Act and regulations of the Secretary;

(C) determinations with respect to which a request for judicial review was pending on September 19, 1984, and which involve an individual litigant or a member of a class in a class action who is identified by name in such pending action on such date; and

(D) determinations with respect to which a timely request for judicial review is or has been made by an individual litigant of a final decision of the Secretary made within 60 days prior to the date of the enactment of this Act.

In the case of determinations described in subparagraphs (C) and (D) in actions relating to medical improvement, the

court shall remand such cases to the Secretary for review in accordance with the provisions of the Social Security Act as amended by this section.

(3) In the case of a recipient of benefits under title II, XVI, or XVIII of the Social Security Act —

(A) who has been determined not to be entitled to such benefits on the basis of a finding that the physical or mental impairment on the basis of which such benefits were provided has ceased, does not exist, or is not disabling, and

(B) who was a member of a class certified on or before September 19, 1984, in a class action relating to medical improvement pending on September 19, 1984, but was not identified by name as a member of the class on such date,

the court shall remand such case to the Secretary. The Secretary shall notify such individual by certified mail that he may request a review of the determination described in subparagraph (A) based on the provisions of this section and the provisions of the Social Security Act as amended by this section. Such notification shall specify that the individual must request such review within 120 days after the date on which such notification is received. If such request is made in a timely manner, the Secretary shall make a review of the determination described in subparagraph (A) in accordance with the provisions of this section and the provisions of the Social Security Act as amended by this section. The amendments made by this section shall apply with respect to such review, and the determination described in subparagraph (A) (and any redetermination resulting from such review) shall be subject to further administrative and judicial review, only if such request is made in a timely manner.

(4) The decision by the Secretary on a case remanded by a court pursuant to this subsection shall be regarded as a new decision on the individual's claim for benefits, which supersedes the final decision of the Secretary. The new decision

shall be subject to further administrative review and to judicial review only in conformity with the time limits, exhaustion requirements, and other provisions of section 205 of the Social Security Act and regulations issued by the Secretary in conformity with such section.

(5) No class in a class action relating to medical improvement may be certified after September 19, 1984, if the class action seeks judicial review of a decision terminating entitlement (or a period of disability) made by the Secretary of Health and Human Services prior to September 19, 1984.

(6) For purposes of this subsection, the term "action relating to medical improvement" means an action raising the issue of whether an individual who has had his entitlement to benefits under title II, XVI, or XVIII of the Social Security Act based on disability terminated (or period of disability ended) should not have had such entitlement terminated (or period of disability ended) without consideration of whether there has been medical improvement in the condition of such individual (or another individual on whose disability such entitlement is based) since the time of a prior determination that the individual was under a disability.

(e) Any individual whose case is remanded to the Secretary pursuant to subsection (d) or whose request for a review is made in a timely manner pursuant to subsection (d), may elect, in accordance with section 223(g) or 1631(a)(7) of the Social Security Act, to have payments made beginning with the month in which he makes such election, and ending as under such section 223(g) or 1631(a)(7). Nothwithstanding such section 223(g) or 1631(a)(7), such payments (if elected) —

(1) shall be made at least until an initial redetermination is made by the Secretary; and

(2) shall begin with the payment for the month in which such individual makes such election.

(f) In the case of any individual who is found to be under a disability after a review required under this section, such

individual shall be entitled to retroactive benefits beginning with benefits payable for the first month to which the most recent termination of benefits applied.

(g) The Secretary of Health and Human Services shall prescribe regulations necessary to implement the amendments made by this section not later than 180 days after the date of the enactment of this Act.

EVALUATION OF PAIN

SEC. 3. (a)(1) Section 223(d)(5) of the Social Security Act is amended by inserting after the first sentence the following new sentences: "An individual's statement as to pain or other symptoms shall not alone be conclusive evidence of disability as defined in this section; there must be medical signs and findings, established by medically acceptable clinical or laboratory diagnostic techniques, which show the existence of a medical impairment that results from anatomical, physiological, or psychological abnormalities which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered with all evidence required to be furnished under this paragraph (including statements of the individual or his physician as to the intensity and persistence of such pain or other symptoms which may reasonably be accepted as consistent with the medical signs and findings), would lead to a conclusion that the individual is under a disability. Objective medical evidence of pain or other symptoms established by medically acceptable clinical or laboratory techniques (for example, deteriorating nerve or muscle tissue) mist be considered in reaching a conclusion as to whether the individual is under a disability."

(2) Section 1614(a)(3)(H) of such Act (as added by section 8 of this Act) is amended by striking out "section 221(h)" and inserting in lieu thereof "section 221(h) and 223(d)(5)".

(3) The amendments made by paragraphs (1) and (2) shall apply to determinations made prior to January 1, 1987.

(b)(1) The Secretary of Health and Human Services shall appoint a Commission on the Evaluation of Pain (hereafter in this section referred to as the "Commission") to conduct a study concerning the evaluation of pain in determining under titles II and XVI of the Social Security Act whether an individual is under a disability. Such study shall be conducted in consultation with the National Academy of Sciences.

(2) The Commission shall consist of at least twelve experts, including a significant representation from the field of medicine who are involved in the study of pain, and representation from the fields of law, administration of disability insurance programs, and other appropriate fields of expertise.

(3) The Commission shall be appointed by the Secretary of Health and Human Services (without regard to the requirements of the Federal Advisory Committee Act) within 60 days after the date of the enactment of this Act. The Secretary shall from time to time appoint one of the members to serve as Chairman. The Commission shall meet as often as the Secretary deems necessary.

(4) Members of the Commission shall be appointed without regard to the provisions of title 5, United States Code, governing appointments in the competitive service. Members who are not employees of the United States, while attending meetings of the Commission or otherwise serving on the business of the Commission, shall be paid at a rate equal to the per diem equivalent of the rate provided for level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day, including traveltime, during which they are engaged in the actual performance of duties vested in the Commission. While engaged in the performance of such duties away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence, as

authorized by section 5703 of title 5, United States Code, for persons in the Government service employed intermittently.

(5) The Commission may engage such technical assistance from individuals skilled in medical and other aspects of pain as may be necessary to carry out its functions. The Secretary shall make available to the Commission such secretarial, clerical, and other assistance and any pertinent data prepared by the Department of Health and Human Services as the Commission may require to carry out its functions.

(6) The Secretary shall submit the results of the study under paragraph (1), together with any recommendations, to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate not later than December 31, 1985. The Commission shall terminate at the time such results are submitted.

16

From H. R. Conference Report 98-1-39:

10. Acquiescence or Non-Acquiescence In Court of Appeals Decisions

Present law

Claimants for benefits under the Social Security Act may appeal State agency denials through several levels of administrative appeal. A claimant who wishes to continue to pursue appeal may next turn to the Federal district court with jurisdiction over his or her claim. The district court reviews the record as complied by the agency to determine whether substantial evidence existed for the agency's decision. The district court's decision may be appealed, by the claimant or the Secretary, to the Circuit Court with jurisdiction, and ultimately to the Supreme Court (which may or may not agree to hear the appeal).

Under the Federal judicial system, decisions by a Circuit Court of Appeals constitute binding case law to be followed by all district courts in that circuit. (District courts are not bound by the case laws of other circuits and often develop contrary case laws on the same issue.)

In general, if two circuits rule differently on a particular issue, the Supreme Court will review the issue to settle the dispute, although frequently the Court will decline to review for an extended period of time if the issue is not ripe for disposition, or if it is not of sufficient importance to warrant immediate attention. If a particular policy is found by the Supreme Court to be unconstitutional, or contrary to the statute, that decision is binding on the agency.

Most social security cases decided in the Federal courts have little value as precedent for SSA decisions, since most reversals of agency determinations rest on the lack of substantial evidence for the agency's position. However, in some instances, the court's opinion is based on matter of a statutory interpretation.

The Social Security Administration abides by the final judgments of Federal courts with respect to the individuals in particular cases. It does not, however, consider itself bound with respect to nonlitigants as far as adopting as agency policy, either in the circuit or nationwide, the interpretation underlying a Circuit Court's decision. If the decision of a Circuit Court is contrary to the Secretary's interpretation of the Social Security Act and regulations, SSA, like some other Federal agencies, issues a ruling stating that it will not adopt the court's decision as agency policy. There are currently 7 such rulings of nonacquiescence by the Social Security Administration.

House bill

Requires that a decision of a Circuit Court of Appeals interpreting title II of the Social Security Act or its regulations in a manner different from prevailing policy be appealed to the Supreme Court or the Secretary must apply the interpretation underlying that decision as agency policy in the circuit. If the Supreme Court denies review, circuit-wide acquiescence with that interpretation would be required until the Supreme Court ruled on the issue. Includes title XVI conforming amendment.

Effective date. — On enactment, with respect to all circuit court decisions made on or after the date of enactment, and with respect to circuit court decisions for which the Secretary still has an opportunity to request review by the Supreme Court.

Senate amendment

Requires SSA to notify Congress and print in the *Federal Register* (within 90 days after decision date, or on the last date available for appeal, whichever is later) an explanation of the agency's decision to acquiesce or not acquiesce in decisions of the Circuit Courts relating to interpretation of the Social Security Act or of regulations issued under the

Act. In cases where the Secretary is acquiescing, the reporting requirement would apply only to significant decisions.

States that nothing in the section shall be interpreted as sanctioning any decision of the Secretary not to acquiesce in the decision of a circuit court.

Effective date. — Applies to Court decisions rendered after the date of enactment.

Conference agreement

The conference agreement deletes both the House and Senate language. The conferees do not intend that the agreement to drop both provisions be interpreted as approval of "non-acquiescence" by a federal agency to an interpretation of a U.S. Circuit Court of Appeals as a general practice. On the contrary, the conferees note that questions have been raised about the constitutional basis of non-acquiescence and many of the conferees have strong concerns about some of the ways in which this policy has been applied, even if constitutional. Thus, the conferees urge that a policy of non-acquiescence be followed only in situations where the Administration has initiated or has the reasonable expectation and intention of initiating the steps necessary to receive a review of the issue in the Supreme Court.

The conferees reaffirm the congressional intent that the Secretary resolve policy conflicts promptly in order to achieve consistent uniform administration of the program. This objective may be achieved in at least two ways other than non-acquiescence when the agency is faced with conflicting interpretations of the meaning and intent of the Social Security Act: either to appeal the issue to the Supreme Court, or to seek a legislative remedy from the Congress.

When there are court rulings which the Secretary believes are inconsistent with the meaning and intent of the law, the Secretary should diligently pursue appropriate appeals channels on an expeditious basis. By refusing to apply circuit court interpretations and by not promptly seeking review by

the Supreme Court, the Secretary forces beneficiaries to relitigate the same issue over and over again in the circuit, at substantial expense to both beneficiaries and the federal government. This is clearly an undesirable consequence. The conferees also feel that in addition to the practical administrative problems which may be raised by non-acquiescence, the legal and Constitutional issues raised by non-acquiescence can only be settled by the Supreme Court. The conferees therefore urge the Administration to seek a resolution of this issue.

The conferees recognize that the realities of litigation do not make it appropriate or feasible to appeal every adverse decision with which the Secretary continues to disagree. In such instances, however, the conferees strongly insist that Congress' judgment as to the appropriate policy should prevail. The conferees expect the Secretary to propose what she believes to be appropriate remedial legislation for congressional consideration.

It is clearly undesirable to have major differences in statutory interpretation between the Secretary and the courts remain unresolved for a protracted period of time. The conferees believe this legislation takes a major step toward removing the obstacles to resolution by clarifying the statutory language and congressional intent.

20 C.F.R. § 404.1529: If you have a physical or mental impairment, you may have symptoms (like pain, shortness of breath, weakness or nervousness). We consider all your symptoms, including pain, and the extent to which signs and laboratory findings confirm these symptoms. The effects of all symptoms, including severe and prolonged pain, must be evaluated on the basis of a medically determinable impairment which can be shown to be the cause of the symptom. We will never find that you are disabled based on your symptoms, including pain, unless medical signs or findings show that there is a medical condition that could be reasonably expected to produce those symptoms.

20 C.F.R. § 404.1633 (b): The State agency making determinations of disability will comply with the written guidelines in the Disability Insurance section of the Program Operations Manual System. This manual will also include certain policies, procedures, guides and operating instructions designated as advisory or discretionary.

20 C.F.R. § 416.1033 (b): The State agency making determinations of disability will comply with the written guidelines in the Disability Insurance section of the Program Operations Manual System. This manual will also include certain policies, procedures, guides and operating instructions designated as advisory or discretionary.

20 C.F.R. Subpart P, App. 1, § 4.00 C: *Hypertensive vascular disease* does not result in severe impairment unless it causes severe damage to one or more of four end organs: heart, brain, kidneys, or eyes (retinae). The presence of such damage must be established by appropriate abnormal physical signs and laboratory findings as specified in 4.02 or 4.04, or for the body system involved.

From **SSR 82-55:**

PURPOSE: To enunciate the policy regarding nonsevere impairments and to provide examples of impairments that are not severe in order to more clearly illustrate the level of severity required before the concept of "nonsevere impairment" can be applied in the sequential evaluation of disability.

***

The following examples are merely representative of the types of impairments which would be considered not severe and are not intended to be all inclusive.

***

4. Cardiovascular

   a. Hypertension without significant organ damage, current or past.

***

7. Endocrine

   a. Diabetes mellitus, adult onset, controlled on prescribed therapy, without significant end-organ damage or recent episodes of acidosis.

[Identical language appears at POMS 2107.]

From **SSR 82-58:**

PURPOSE: To state the policy and describe the consideration given to symptoms, particularly that of pain, in the evaluation of disability under titles II and XVI of the Social Security Act.

***

POLICY STATEMENT: Symptoms will not have a significant effect on a disability determination or decision unless medical signs or findings show that a medical condition is present that could reasonably be expected to produce the symptoms which are alleged or reported. However, once such a medical condition (e.g., disc disease) is objectively established, the symptoms are still not controlling for purposes of evaluating disability. Clinical and laboratory data and a well-documented medical history must establish findings which may reasonably account for the symptom in a particular impairment. Objective clinical findings which can be used to draw reasonable conclusions about the validity of the intensity and persistence of the symptom and about its effect on the individual's work capacity must be present. For example, in cases of back pain associated with disc disease, typical associated findings are muscle spasm, sensory loss, motor loss, and atrophy. There must be an objective basis to support the overall evaluation of impairment severity. It is not sufficient to merely establish a diagnosis or a source for the symptom.

[Identical language appears at POMS 2205.]

SSR 81-6

TITLES II AND XVI: CONTINUANCE OR CESSATION OF DISABILITY OR BLINDNESS

PURPOSE: To state the policy for determining whether disability or blindness under titles II and XVI continues or ceases.

CITATIONS (AUTHORITY): Sections 221 and 1631 of the Social Security Act; Regulations No. 4, sections 404.1579, 404,1586 and 404.1594; Regulations No. 16, section 416.994.

PERTINENT HISTORY: Under operating guides which have been in effect for approximately 3 years, disability or blindness is found to have ceased when current evidence shows that the individual does not meet the definition of disability or blindness under which his or her claim was allowed; it is not necessary to show that the individual's medical condition has "improved" since the prior determination. However, prior regulations had been interpreted by some to mean that before cessation of disability or blindness could be found, there must have been a positive showing of medical improvement. Such an interpretation precluded a finding of cessation in cases where current evidence showed that the individual was not disabled or blind, but it could not be shown that actual "improvement" had taken place. The regulations have now been revised to clarify this issue.

POLICY STATEMENT: Where the evidence obtained at the time of a continuing disability investigation (CDI) establishes that the individual is not currently disabled or blind, a finding of cessation is appropriate. It will not be necessary to determine whether or how much the individual's condition has medically improved since the prior favorable determination.

EFFECTIVE DATE: Final regulations covering this policy were effective August 20, 1980, the date of publication in the Federal Register (45 FR 55566).

SSR 82-49c

Patti v. Schweiker, 9th Circuit, Civ. No. 80-5763 (2/18/82)

The Social Security Administration (SSA) does not acquiesce in the court's decision.

The claimant had been receiving supplemental security income (SSI) benefits as a disabled individual since 1976. In December 1977, SSA informed the claimant that her disability had ceased. After a hearing in March 1978, this determination was reversed by an administrative law judge (ALJ) and the claimant's benefits were continued. SSA then informed the claimant that her disability had ceased in April 1979, and that determination was affirmed by the district court.

The Court of Appeals, however, reversed SSA's determination. The court found that the determination of disability in 1978 gave rise to a presumption at the hearing in 1979 that the claimant was still disabled. While the opinion acknowledges that this presumption does not shift the burden of proof and the claimant still has the burden of proving her case, the court found that the presumption imposes on the Secretary the burden of going forward with evidence that the claimant's condition has medically improved or otherwise changed. Finding that there was essentially no evidence to support a conclusion that the claimant's condition had changed, the court held that SSA's determination that the claimant's disability had ceased was not supported by substantial evidence.

In essence, the court has concluded that SSA must show that an SSI recipient's condition has improved or otherwise changed before it can determine that the recipient's disability has ceased. SSA disagrees with the court's conclusion that medical improvement or other change is required in these cases.

Regardless of whether medical improvement or other change is or is not shown, under 20 CFR 416.994(b)(1), a determination of cessation is appropriate for an SSI nongrandfatheree if the recipient is not disabled under the Federal criteria; i.e., current medical or other evidence shows that the recipient is able to engage in substantial gainful activity.

Since the claimant in *Patti* is an SSI nongrandfatheree, SSA determined that her disability ceased in April 1979 because it found, on the basis of current medical evidence, that she was capable of engaging in substantial gainful activity (i.e., she does not meet the Federal definition of disability).

As noted above, under 20 CFR 416.994(b)(1), issued in August 1980, SSA is not required to show medical improvement or other change in order to terminate SSI disability benefits. However, the final administrative decision in *Patti* was issued prior to August 1980 so that the court's decision in *Patti* was based on an administrative decision involving regulations no longer in effect. Moreover, the Court of Appeals in *Patti* did not even address either the August 1980 regulations or the earlier regulations governing when disability ceases. For these reasons (and since there are other Court of Appeals decisions which do not require a showing of improvement to terminate disability benefits), we believe that *Patti* does not provide a judicial interpretation of the disability regulations which should be followed.

Consequently, SSA holds that, even if current medical or other evidence does not show "medical improvement" or other change, the disability of a non-grandfathered SSI recipient is subject to cessation if such evidence shows that the recipient is able to engage in substantial gainful activity (i.e., the recipient does not meet the Federal definition of disability).

SSR 82-64

TITLES II AND XVI: THE OBLIGATION OF THE SOCIAL SECURITY ADMINISTRATION (SSA) TO INVESTIGATE CONTINUANCE OF DISABILITY AND EVALUATION GUIDES FOR DETERMINING WHETHER DISABILITY CONTINUES

PURPOSE: To state the obligations of SSA to investigate continuance of disability and provide the standards and evaluation guides for determining whether disability continues.

CITATIONS (AUTHORITY): Sections 216(i), 223(d), and 1614(a) of the Social Security Act, as amended; Regulations No. 4, Subpart P, sections 404.1530, 404.1589, 404.1590, 404.1593, and 404.1598; and Regulations No. 16, Subpart I, sections 416.930, 416,989, 416.990, 416.993, and 416.998.

INTRODUCTION: This Program Policy Statement (PPS) states the reason for conducting continuing disability investigations and contains an explanation of several policies for evaluating disability claims which are to be used as guides in deciding whether an individual is currently disabled. These policies include finding that disability or blindness has stopped if new evidence shows the person is not disabled or blind as defined in the law, determining when a person becomes disabled by another impairment, evaluating residual functional capacity and vocational background, securing consultative examinations to resolve medical issues, and evaluating some special considerations in continuing disability cases. These policies are applicable to all determinations.

POLICY STATEMENT:

The Obligation to Investigate Continuance of Disability

Disability ceases when the physical or mental impairment together with the vocational profile (i.e., his or her age, education, work experience, etc.), where appropriate, does not prevent the individual from engaging in substantial gainful activity (SGA) or, subject to the trial work period (TWP) provisions, the individual demonstrates, by working, the ability to engage in SGA (except in certain title II cases based on statutory blindness).

SSA has an obligation to terminate benefits based on disability and freeze periods when an individual is not disabled. The primary purpose of a continuing disability investigation (CDI) is to obtain complete and current information about the disabled individual's physical and/or mental condition and any work activity. The information is required so that an evaluator may determine whether the individual is still under a disability.

The 1980 disability amendments (P.L. 96-265) provide certain work incentive benefits to persons who complete 9 months of trial work and whose disability ceases because of their activity. To qualify for the work incentive benefits, the person must continue to have a disabling impairment. CDI's are conducted in these cases if there is reason to question whether the impairment continues to be disabling.

Evaluation Guides for Determining Whether Disability Continues

The standards and the evaluation guidelines that apply in determining initial disability also apply in determining whether disability continues. The question to be resolved is whether the individual is currently disabled. The fact that the individual is currently receiving benefits on the basis of disability does not shift the burden of establishing that disability is continuing from the claimant to SSA. All evidence

secured in connection with the original determination is in the folder for consideration. However, the determination or decision as to whether or not disability continues is not controlled by any prior determination or decision which established that the individual was disabled.

In determining whether the individual is currently disabled, current medical evidence will be obtained. It is not essential that the evidence indicate a change in the individual's impairment. Thus, it is possible current evidence will warrant a cessation of disability even where such evidence is essentially similar to the evidence of record when disability was originally established or when a prior CDI was conducted. This is true regardless of the administrative or judicial level at which disability was originally established or previously continued. Also, the fact that disability is ceased as a result of a CDI because the individual is not currently disabled would not ordinarily raise a question regarding the correctness of any prior determination or decision which found that the individual was disabled.

In determining whether the individual is currently disabled, the original impairments and any new conditions will be considered. If a new, severe impairment begins in or before the month in which the last impairment ceases to be disabling (i.e., the month of cessation) disability is continued until the individual has the capacity to engage in SGA. The new impairment need not be expected to last 12 months or result in death, but it must be severe enough to prevent the person from performing SGA. If the individual again becomes disabled after the month in which the last impairment ceases to be disabling, there is a break in the continuity of disability. This break requires a cessation of the last disability and independent consideration of any new impairment for a new disability, even though the new impairment may begin before the month of termination of the last period

of disability. Severity and duration requirements must be met to establish a new disability.

If an individual's impairment might reasonably have been expected to improve (i.e., a medical reexamination diary was established), a subsequent return to work before the month of the scheduled medical reexamination is considered as a possible indication of medical recovery. Where an individual's return to work coincided with an established medical reexamination diary, SSA may first learn of the individual's return to work through the individual's responses at the time of the continuing disability interview. SSA must carefully consider the development already undertaken, if any, to determine whether further medical documentation is needed and, if so, the type and extent necessary for a sound determination of continuance or cessation.

When an individual has been so severely impaired that an allowance was justified, some residual impairment may remain even after maximum treatment. The continuing disability evaluation process requires a determination as to whether any residual impairment precludes the individual from engaging in SGA.

When the question of continuing disability cannot be resolved on medical consideration alone, and it is necessary to consider vocational factors, and the individual is unable to return to past relevant work, evaluation of the claimant's ability to make an adjustment to other work will include consideration of skills acquired through vocational rehabilitation or other training. A new evaluation of the individual's present capacity to engage in SGA will be required in these cases.

SSA must evaluate the evidence with care before preparing a determination (either continuance or cessation) to assure that the total evidence accurately portrays the individual's current condition. When the medical and vocational evidence of record covering the original impairment and any

new impairment establishes that the individual's condition together with the vocational profile, where appropriate, precludes SGA, in the absence of demonstrated SGA, a continuance is warranted. If, however, the evidence demonstrates that the individual's condition together with the vocational profile, where appropriate, does not preclude SGA, a cessation is appropriate. If information furnished by the individual concerning the current medical condition is consistent with the statements from the treating physician which are supported by clinical and laboratory findings, and there is no reason to believe that the individual's condition has changed, a determination as to the continuance or cessation of disability will be made without further development. In all cases in which the evidence of record is unavailable, inadequate, equivocal or inconclusive, a consultative examination will be obtained to resolve medical issues.

In disabled widow/widower cases, a finding of medical cessation is appropriate when the medical evidence shows the impairment does not meet or equal the Listing. In title XVI childhood cases, a finding of medical cessation is appropriate when the medical evidence shows the impairment does not meet or equal the childhood impairment listings in part B of the Listing of Impairments or the Part A listings where the childhood listings are not appropriate.

Special Evaluation Considerations

The following considerations assume particular importance in evaluating continuing disability cases:

1. Temporary Improvement

   Improvement that is only temporary does not warrant a finding that the individual does not have a disabling impairment. The probable duration of improvement and the prognosis should be carefully considered, particularly if the disease is characterized by periods of remission followed by relapse. All factors must be considered

before it is concluded that improvement is more than temporary.

2. Examination Reflecting Result of Rest

Conditions which become comparatively symptom-free after prolonged rest must be given careful consideration. Only where it can reasonably be expected that the capacity for SGA can be maintained under ordinary conditions of life in work setting of the type for which the individual is qualified may a finding of cessation be made.

3. Medical Regimen

Generally, when an individual is hospitalized or a treating physician markedly restricts an individual's activities, the signs, symptoms, and laboratory findings will establish that a severe impairment exists which continues to prevent the individual from engaging in any SGA. Hospitalization, prescribed therapy which prevents work, or the judgment by the treating source that the individual should not work are not, however, in themselves, sufficient evidence to support a finding of continuance.

In making an independent judgment as to an individual's ability to engage in SGA, the evidence provided by the individual's treating physician must by considered. Careful consideration must always be given to the possibility that the treating physician has additional medical information not reflected in the file which might support a finding of continuance. If, however, full development has been undertaken and the evidence does not support a finding of disability under existing policies and regulations, a finding of cessation is appropriate.

4. Recommended Treatment Not Followed

   In those cases where the previously recommended treatment has not been followed, all pertinent aspects, particularly with respect to why the recommended treatment has not been carried out, should be developed. Where the evidence establishes the individual's unjustified failure to follow prescribed treatment which could be expected to restore the capacity for SGA, a finding of cessation should be made (see SSR 82-59 (PPS-78: Failure to Follow Prescribed Treatment).)

5. Nonrollback Conversion Cases

   Where the individual was a supplemental security income grandfatheree and is receiving SSI benefits based on disability, disability will be ceased when the individual's impairment as shown by current medical or other evidence does not meet the criteria of the appropriate State plan or the Federal criteria (SSR 82-10C).

   EFFECTIVE DATE: The policies covered by this PPS have been in effect for many years except for the policy on work incentives. This policy became effective December 1, 1980, as specified by the Social Security Disability Amendments of 1980.

   CROSS-REFERENCE: Program Operations Manual System Part 4, Chapter II.

Department of
HEALTH AND HUMAN SERVICES
Social Security Administration
Office of Hearings and Appeals

INTERIM CIRCULAR NO. 185

Office of Hearings and Appeals Handbook

Applicability of Circuit Court Decisions at Administrative Law Judge and Appeals Council Levels

I. *Background*

SSA has been subject to increasing litigation in recent years involving a myriad of program issues. One of the most troubling questions which has been raised by the Congress, the Courts, and by the public at large has been the issue of nonacquiescence. Recently, nonacquiescence has been the subject of various law suits challenging its legality. Moreover, the Congress, in enacting the 1984 Disability Amendments, indicated in the Conference Report on that legislation that the Secretary should seek a resolution of the issue. These developments have led to a reexamination of the agency's practices. As a result, the Secretary has decided to modify the longstanding policy and has established the procedures described below. These procedures require that particular circuit court decisions will be considered prior to a final decision of the Secretary being rendered on the case. Until further notification, the procedures contained in this Interim Circular supersede the instructions contained in section 1 - 16 "*Court Decisions*" of the OHA Handbook.

A series of Social Security Rulings (SSRs) will be issued identifying circuit court decisions which are at variance with established SSA policy (i.e. the law, Regulations and SSRs) for each of the circuits and which will be considered at the Administrative Law Judge (ALJ) and Appeals Council (AC)

levels. These SSRs will provide a full description of the case and an explanation of how SSA will apply the decision within the circuit. They will be issued not as new adjudicative policy but rather as a part of the agency's procedures for reviewing claims from the standpoint of Court of Appeals law and as a part of the agency's ongoing litigation management program.

The ALJ should begin to address circuit court case law as soon as these SSRs are published. Thereafter, if the ALJ concludes that a circuit court decision, as interpreted by the agency in an SSR, dictates an allowance (partial or full) in a particular case while SSA policy would dictate a denial, a recommended decision favorable to the claimant will be issued by the ALJ and reviewed automatically by the AC. Wherever reference is made in this Circular to "applicable circuit court decisions," "applicable circuit court case law" or "circuit court case law" it means such decisions or case law as interpreted by the agency in an SSR.

II. *ALJ Procedures*

A. *General*

Where a request for hearing is received involving an issue on which an SSR has been published which indicates that circuit court case law in the circuit in which the claimant resides is at variance with SSA policy, the procedures discussed below will be followed.

B. *Notice of Hearing*

The usual notice of hearing procedures will be followed. However, the notice of hearing will be revised to indicate that in certain situations the agency will also consider the applicable circuit court case law on the issue(s) to be decided. As appropriate, model language will be furnished in supplements to this IC.

C. *Conduct of Hearing*

As usual, the ALJ is to inquire fully into the matters at issue. The inquiry must consider the applicable requirements established by circuit court case law, if appropriate, in addition to those under agency policy. The opening statement by the ALJ should indicate that the agency will consider whether the claimant will be found eligible, entitled, continued, etc. under applicable circuit court case law as well as under SSA policy.

D. *Decision*

Preparation of the decision will differ depending on how the ALJ is prepared to rule in the case:

- Where applicable circuit court case law differs from SSA policy on a particular issue but the ALJ is prepared to rule fully favorably to the claimant under SSA policy, the decision need not consider or address the applicable case law. An initial ALJ decision should be issued in the usual manner.
- If the ALJ is prepared to find unfavorably to the claimant under both SSA policy and applicable circuit court case law, the decisional rationale should contain evaluation of the evidence addressing both established SSA policy and the case law. Findings and decisional language addressing both established policy and applicable circuit court case law should also be made. An initial ALJ decision should be issued in the usual manner.
- Where the ALJ is prepared to rule unfavorably to the claimant under SSA policy but favorably to the claimant under the agency's interpretation of circuit court case law as set forth in the applicable SSR, a *recommended* favorable decision will be issued. The recommended decision should contain separate sections on the case law which will be included following the standardized text statement of SSA regulations. A separate section should

be included in the rationale using applicable circuit court case law. This should follow the section on evaluation of the evidence under established SSA policy. Separate recommended findings and a recommended decisional paragraph under the case law will be made and included following the recommended findings under SSA policy. Those sections of the recommended favorable decision dealing with applicable circuit court case law should be specifically identified as such so that the AC can readily identify them in reviewing the recommended decision. As an example, after the section headed FINDINGS in which SSA policy would be applied, a separate section headed FINDINGS — CIRCUIT LAW APPLIED should be included.

E. *Processing of Decision*

All decisions issued under this Circular will be processed in the usual manner. The usual notice to the claimant which accompanies a decision (recommended or initial) will be issued.

III. *AC Procedures*

A. *ALJ Decision Favorable to the Claimant Under SSA Policy*

If own motion review is being considered where the ALJ issued a favorable decision to the claimant under SSA policy which the AC considers to be contrary to such policy, the AC must determine whether a favorable decision could have been made under applicable circuit court case law. If so, own motion review need not be taken. If own motion review is not taken, the ALJ's favorable decision will become the final agency decision. If it is not clear whether the case law would result in a different decision, the AC should remand the case to an ALJ for a hearing, as necessary, and recommended decision on the issue of the effect of applicable circuit court case law on the claim.

B. *ALJ Decision Unfavorable to the Claimant Under Both Agency Policy and Circuit Court Case Law*

A claimant may request review of an ALJ hearing decision which was unfavorable to the claimant under both SSA policy and applicable circuit court case law. Where the AC agrees that the unfavorable decision is supported by substantial evidence, the request for review will be denied. If the AC believes that the decision is not correct with respect to SSA policy, the usual AC procedures will be followed. Where the AC believes that the decision with respect to the agency policy is correct, but may be incorrect with respect to circuit court case law, the request for review will be granted.

The following actions may be taken:

- If the AC believes that a decision favorable to the claimant should have been recommended under applicable circuit court case law and from a litigation standpoint the case might be expected to result in a court decision adverse to the Secretary if an unfavorable administrative decision were issued and judicial review were sought by the claimant, a decision favorable to the claimant will be issued by the AC.
- Where the AC believes that further development must be undertaken with respect to circuit court case law, the case will be remanded to the ALJ for that purpose.
- Where the AC believes that the decision unfavorable to the claimant is correct with respect to SSA's policy but contrary to circuit court case law but believes the issue should be relitigated in that circuit on the basis of that case, the AC will prepare a draft unfavorable decision which will be circulated and handled as described in section C below.

C. *ALJ Decision Unfavorable to the Claimant Under SSA's Policy — Favorable to the Claimant Under Circuit Court Case Law*

The AC will consider the recommended decision under its usual criteria. After its review, if the AC agrees with the ALJ's findings under circuit law as interpreted by the agency, the Council will ordinarily adopt the ALJ's recommended decision. If the AC is of the opinion that the ALJ's decision incorrectly interprets circuit law, corrective action will be taken by the AC (i.e., the AC will either issue a revised decision unfavorable to the claimant or remand for further development). A copy of the AC decision will be forwarded to an SSA Special Policy Review Committee for use in evaluating this procedure.

If the AC agrees with the ALJ's conclusion in a decision which is unfavorable to the claimant under SSA policy but favorable to the claimant under circuit court law but believes the issue involved should be relitigated in that circuit in the context of that case, the AC will prepare a draft decision unfavorable to the claimant which will be forwarded to the SSA Special Policy Review Committee for its review. If the Committee decides that the case is an appropriate vehicle for relitigating the issue, the Office of the General Counsel shall consult with the Department of Justice as to whether or not it believes relitigation of the issue is appropriate. If relitigation is determined to be appropriate, the AC's unfavorable decision will be issued. If relitigation is not appropriate in the particular case, the ALJ's recommended decision favorable to the claimant will be adopted by the AC because it will have been decided that, from a litigation standpoint, the case might be expected to result in a court decision adverse to the Secretary if an unfavorable administrative decision were issued and judicial review were sought by the claimant.

AMERICAN BAR ASSOCIATION

Report No. 110

BE IT RESOLVED, That the American Bar Association urges the Social Security Administration to observe, in all stages of administrative proceedings, the applicable decisions of the United States Court of Appeals for the circuit in which the matter has arisen, subject to the agency seeking review in the United States Supreme Court.

BE IT FURTHER RESOLVED, That the American Bar Association urges that, in the event the Social Security Administration continues its nonacquiescence policy, in its former or present form, Congress enact legislation to mandate the agency to observe fully within each circuit the decisions of the Court of Appeals within that circuit, subject to the agency seeking review in the United States Supreme Court.

Passed: July 10, 1985.

Supreme Court of the United States

No. A-977

PATRICK H. HYATT, ET AL.,

Applicants,

v.

MARGARET M. HECKLER,
SECRETARY OF HEALTH HUMAN SERVICES, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 20, 1985.

/s/ WARREN E. BURGER
Chief Justice of the United States

Dated this 3rd
day of July, 1985

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-1381

Patrick H. Hyatt: Herman O. Caudle and Mary P. Lovingood, on behalf of themselves and all others similarly situated, North Carolina Department of Human Resources, Disability Determination Services,

Appellees,

vs.

Margaret M. Heckler, or her successor in office, Secretary of the United States Department of Health and Human Services

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge. (C/A 83-655)

Argued: June 7, 1984 Decided: March 20, 1985

No. 84-1695

Patrick H. Hyatt; Herman O. Caudle and Mary P. Lovingood, on behalf of themselves and all others similarly situated, North Carolina Department of Human Resources, Disability Determination Services,

Appellees,

-v-

Margaret M. Heckler, or her successor in office, Secretary of the United States Department of Health and Human Services,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge. (C/A 83-655).

Submitted: August 9, 1984 Decided: March 20, 1985

Before RUSSELL and HALL, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Howard S. Scher, Attorney, Appellate Staff, Civil Division, United States Department of Justice (Richard K. Willard, Acting Assistant Attorney General; Charles R. Brewer,

United States Attorney; William Kanter and Deborah R. Kant, Attorneys, Appellate Staff, Civil Division, United States Department of Justice, on brief) for appellants;

John R. Wester (Dan T. Coenen, Robert M. Bryan, Herman Spence, III, Fleming, Robinson, Bradshaw & Hinson, P.A.; Jane Harper, Legal Services of Southern Piedmont, Inc., on brief) for appellees in 84-1381; (John R. Wester, Dan T. Coenen, Robert M. Bryan, Fleming, Robinson, Bradshaw & Hinson, P.A.; Charles McBrayer Sasser, Legal Services of Southern Piedmont, Inc., on brief) for appellees in 84-1695; Jeffrey L. Bishop (Casey, Bishop, Alexander & Murphy, P.A., on brief) for intervenor.

BUTZNER, Senior Circuit Judge:

The Secretary of Health and Human Services appeals from the district court's order enjoining the Secretary to cease her policy of not following the decisional law of this circuit regarding the initiation and termination of disability benefits. The Secretary also assigns error to the district court's certification of a class whose claims are to be reopened and readjudicated in accordance with the standards laid down by this circuit.[1] In a related appeal, the Secretary questions the award of attorneys' fees.

After the parties argued this appeal, Congress enacted the Social Security Disability Benefits Reform Act of 1984, which became effective October 9, 1984.[2] The parties' supplemental briefs disclose that many of the issues raised on appeal have been affected significantly by the new legislation. Furthermore, *Heckler v. Day,* 104 S. Ct. 2249 (1984), and *Heckler v. Ringer,* 104 S. Ct. 2013 (1984), which were decided after entry of the district court's order, provide controlling precedent for aspects of this legislation. The 1984 Act and the recent Supreme Court opinions require us to vacate the district court's judgment and remand the case.

---

[1]The district court's opinion is reported as *Hyatt v. Heckler,* 579 F. Supp. 985 (W.D.N.C. 1984). The district court subsequently revised the published draft of the certification order. The revised subclasses are: initial claimants who allege disability from diabetes or hypertension, A(1)(a), or pain, A(1)(b); claimants whose benefits were terminated, A(2) and B.

[2]Pub. L. No. 98-460, 98 Stat. 1794 (1984).

I.

Terminated Benefits

The district court directed the Secretary to adjudicate the termination of benefits in accordance with circuit precedent.[3] It certified subclasses of North Carolina residents who were entitled to this relief.

We conclude that the 1984 Act controls the claims of all members of the subclasses who assert that their benefits have been terminated unlawfully. Section 2 of the 1984 Act deals with the issue of medical improvement and prescribes the standard of review for the termination of disability benefits. These standards are broad enough to encompass all impairments or combination of impairments, whether physical or mental, that provided the basis for the initial award of benefits.

Section 2(d) of the Act deals with class actions relating to medical improvement pending, as this one was, on September 19, 1984, for judicial review of the termination of benefits. This section provides that the claims of named class members are to be remanded to the Secretary for adjudication in accordance with the provisions of the Act. Also, the claims of unnamed class members are to be remanded to the Secretary, who is directed to notify them of their right to request administrative review.

The government protests that some subclass members whose benefits were terminated are not entitled to a remand because they have not satisfied the requirements of section 205(g) of the Social Security Act, 42 U.S.C. §405(g). This attack on the district court's certification order, however, does not survive the enactment of the 1984 legislation. By directing remand of cases pending September 19, 1984, the

---

[3] *See Dotson v. Schweiker*, 719 F.2d 80 (4th Cir. 1983); *Myers v. Califano*, 611 F.2d 980 (4th Cir. 1980); *Martin v. Secretary*, 492 F.2d 905 (4th Cir. 1974).

Act created an exception to the normal exhaustion requirements for actions, such as this, relating to medical improvement. The import of this provision was explained by Senator Dole:

> The effective date provision does, however, permit all class members of certified class actions to seek review of their cases under the medical improvement standard established by this act, even where they may not have pursued their appeal rights in accordance with section 205 and the Secretary's regulations.

130 Cong. Rec. S11454 (daily ed. Sept. 19, 1984).

Members of one of the subclasses, whose benefits are subject to termination, insist that they are entitled to have claims involving pain evaluated by the Secretary on remand according to this circuit's case law.[4] This contention is foreclosed by section 3(a) of the 1984 Act which prescribes an interim statutory standard for the evaluation of pain in all determinations made prior to January 1, 1987. Because their cases were pending when the 1984 legislation was enacted, the new statutory standard is applicable to their claims. *See Bradley v. Richmond School Board*, 416 U.S. 696, 711-16 (1974); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 102, 110 (1801). Contrary to the claimant's contention, they have no vested constitutional right to have their claims evaluated by standards that were in effect prior to the 1984 Act. *See Richardson v. Belcher*, 404 U.S. 78, 80-81 (1971).

Another subclass included claimants whose benefits were terminated because the Secretary did not follow this circuit's precedent for evaluating hypertension or diabetes mellitus.[5] The district court, concluding that this policy of nonacquiescence was unlawful, required the Secretary to follow circuit precedent with regard to these impairments.

---

[4] *See Myers v. Califano*, 611 F.2d 980 (4th Cir. 1980).

[5] *See Martin v. Secretary*, 492 F.2d 905 (4th Cir. 1974).

Congress is aware of the Secretary's policy of nonacquiescence. As proposed by the House, the 1984 Act would have required the Secretary to acquiesce or petition for certiorari. The Senate bill would have required the Secretary to report her decisions of nonacquiescence to the Congress and to print her explanation in the Federal Register.[6]

The conferees deleted both the House and the Senate provisions, but they did not intend that deletion should be interpreted as approval of nonacquiescence. On the contrary, they noted that questions had been raised concerning the constitutionality of nonacquiescence, as well as the application of the policy, even if constitutional. "By refusing to apply circuit court interpretations and by not promptly seeking review by the Supreme Court, the Secretary forces beneficiaries to re-litigate the same issue over and over again in the circuit, at substantial expense to both beneficiaries and the federal government. This is clearly an undesirable consequence." Conference Report at 38, 130 Cong. Rec. at H9831. The conferees reaffirmed that Congress intended the Secretary to resolve policy conflicts promptly to assure uniform administration of the program. This objective, they pointed out, may be achieved by diligently pursuing appeals or by seeking a legislative remedy.[7] The conferees urged "that a policy of non-acquiescence be followed only in situations where the Administration has initiated or has the reasonable expectation and intention of initiating the steps necessary to receive a review of the issue in the Supreme Court." Conference Report at 37, 130 Cong. Rec. at H9831.

---

[6]*See* H.R. Rep. No. 1039, 98th Cong., 2d Sess. 36-38, *reprinted in* 130 Cong. Rec. H9831 (daily ed. Sept. 19, 1984) (hereinafter cited as Conference Report).

[7]Also, section 10 of the Act directs the Secretary to establish pursuant to the Administrative Procedure Act uniform standards for determining disability.

When the Conference Report is read in conjunction with *Heckler v. Day*, 104 S. Ct. 2249 (1984), it becomes apparent that the injunction must be vacated. In *Day*, the Court vacated an injunction entered in a class action requiring the Secretary to adjudicate all claims and pay benefits within specified times. The Court held that the injunction was "an unwarranted judicial intrusion into this pervasively regulated area . . . . " 104 S. Ct. at 2258. Its opinion rested to a great extent on Congress's rejection of legislation imposing mandatory deadlines on disability reviews.

The controversy over nonacquiescence presents an analogous situation. The conferees deleted a provision of the House bill that would have required acquiescence in circuit precedent in the absence of appeal. *See* Conference Report at 37, 130 Cong. Rec. at H9831. Following the reasoning of *Day*, we cannot approve an injunction imposing the same restraints that Congress rejected.

Vacating the district court's injunction does not leave claimants without a remedy. In the unlikely event that the Secretary spurns the Conference Report, the district courts reviewing the Secretary's decision are bound to apply circuit precedent construing the Social Security Act. But this review would be long and wasteful to the claimant and the government. Both the district court and the conferees spoke forcefully to avoid the harm and extravagance of the policy of routine nonacquiescence. The Secretary should not deem vacation of the injunction as approval of the policy.

We decline the claimants' request that we instruct the district court to retain jurisdiction for review of the Secretary's orders on remand terminating disability. Section 2(d)(4) provides that the Secretary's decision of a remanded case shall be regarded as a new decision subject to review only in conformity with section 205 of the Social Security Act. Section 2(d)(5) prohibits certification of a class relating to medical improvement after September 19, 1984. These

provisions persuade us that Congress intended that judicial review of remanded cases should not be the subject of a class action. Individual review provides an adequate remedy.

We direct the district court to remand to the Secretary the claims of the named plaintiffs and the unnamed class members designated in subclasses A(2) and B, except those whose claims have been mooted by award of benefits *pendente lite*. After remand to the Secretary, the district court should relinquish jurisdiction over the claims of the plaintiffs and unnamed class members.

II.

Initial Benefits

We find merit in the government's challenge to the district court's jurisdiction over some members of the subclasses composed of claimants for initial benefits. The 1984 Act did not provide initial claimants the same right of reconsideration that it granted claimants whose benefits were terminated. Initial claimants, therefore, must be limited to those who meet the requirements of section 205(g) of the Social Security Act, 42 U.S.C. §405(g). *Califano v. Yamasaki*, 442 U.S. 682, 698-701 (1970).

Ordinarily section 405(g) requires exhaustion of administrative remedies before a claimant can seek judicial review. The Court has recognized an exception to this requirement for a claimant who has presented to the Secretary a claim that raises a legal issue wholly collateral to a claim for benefits and who has made a colorable showing that his injury cannot be remedied if exhaustion is required. *Mathews v. Eldridge*, 424 U.S. 319, 326-32 (1976). The district court applied this exception to the general rule and held that exhaustion of remedies was not required.

In *Heckler v. Ringer*, 104 S. Ct. 2013, 2023 (1984), the Court held that a claim that the Secretary was applying an improper standard for entitlement was not wholly collateral

to a claim for benefits. Consequently, exhaustion was required. Here, too, the claims that the Secretary has applied improper standards with respect to pain, diabetes, and hypertension are inextricably intertwined with claims for benefits within the meaning of the exhaustion requirement of section 405(g) as interpreted by the Supreme Court in *Ringer*. Consequently, exhaustion of administrative remedies is necessary for members of the subclasses composed of claimants of initial benefits.

Section 405(g) also requires a claimant to file an action for judicial review within 60 days after the Secretary's final decision. In this circuit, the 60-day requirement is considered to be jurisdictional, and unnamed class members are not exempt from compliance. *Hunt v. Schweiker*, 685 F.2d 121 (4th Cir. 1982). We cannot accept the suggestion that we should overrule *Hunt*, for, as a panel of the court, we lack authority to do this.

On remand, we direct the district court to dismiss the initial claims for disability of class members who have not exhausted their administrative remedies or who have not sought timely judicial review of the Secretary's final decision. The district court should remand to the Secretary all initial claimants in subclasses A(1)(a) and (b) who have satisfied the requirements of section 405(g). Those who raise the issue of pain should be reconsidered by the Secretary in the light of the interim statutory pain standard of section 3(a) of the 1984 Act for the reasons we stated in Part I.

The Act does not address the diabetes and hypertension standards. Nevertheless, we will not assume that the Secretary will disregard the views expressed in the Conference Report about the Secretary's policy of nonacquiescence in circuit law. The Secretary should have an opportunity to reconsider these claims in light of circuit precedent and the legislative history of the 1984 Act. The claimants are entitled

to a decision on this issue, so, if necessary, they can seek review on an unequivocal administrative record.

After remand, the district court should relinquish jurisdiction over the members of these subclasses for reasons mentioned in Part I. Section 405(g) provides an adequate procedure for judicial review of individual claims in each of the three districts of North Carolina where the claimants reside.

III.

Identification of Unnamed Class Members

The district court's order provided for identification of, and notice to, unnamed class members. Section 2(d) of the 1984 Act supersedes the district court's directions to the Secretary with respect to class members whose benefits were terminated.

The district court should amend its order and notice with respect to claimants for initial benefits by providing that the Secretary should identify and notify those members of subclasses A(1)(a) and (b) who have met the requirements of §405(g).

IV.

Mandamus

The appellees contend that the court had mandamus jurisdiction over the claims of all plaintiffs under 28 U.S.C. §1361. They argue that this independent ground obviates the need to satisfy the jurisdictional prerequisites of §405. In *Heckler v. Ringer,* 104 S. Ct. at 2022, the Court noted that mandamus would issue only to a plaintiff who had exhausted all other avenues of relief, and only if the defendant owed the plaintiff a clear nondiscretionary duty. The Court concluded that §405(g) provided an adequate remedy for challenges to the Secretary's denial of claims including

objections based on the Secretary's policies. For these reasons, we hold that mandamus is inappropriate. *See also Starnes v. Schweiker,* 748 F.2d 217 (4th Cir. 1984).

V.

Intervention

The district court allowed the North Carolina Department of Human Resources, Disability Determination Services to intervene pursuant to Rule of Civil Procedure 24(b). The department's complaint challenges the Secretary's policy of nonacquiescence in Fourth Circuit precedent in the same areas as the class action. It seeks declaratory and injunctive relief prohibiting the Secretary from following this policy in North Carolina. The department claims standing to sue because of its role in administering the disability program and as *parens patriae.* The Secretary contends that the department lacks standing.

Ordinarily, rule 24(b) authorizes a district court to permit an agency to intervene in an action that involves a statute that it administers. But in this instance, which involves the standards the Secretary uses for determining disability benefits, sections 405(g) and 405(h) limit actions against the Secretary to an individual who seeks review of a final decision made after a hearing to which he was a party. In *Lowther v. Montgomery County,* 561 F.2d 1120 (4th Cir. 1977), we held that neither a county nor an unincorporated association was an individual entitled to sue under §405(g). The department's function of determining disability does not distinguish its situation from the plaintiffs' in *Lowther.* A claim of standing analogous to the department's was rejected in *D'Amico v. Schweiker,* 698 F.2d 903 (7th Cir. 1983). There administrative law judges who sought to challenge the Secretary's instruction pertaining to the repayment of Social Security benefits were denied standing to sue. The beneficiaries — not the adjudicators — are the proper parties to

seek review under section 405(g). *Lowther* and *D'Amico* foreclose the department's standing in its own right.

The department also lacks standing to sue the federal government in its capacity as *parens patriae.* With respect to a citizen's rights in relation to the federal government, the United States — not the state — occupies the status of *parens patriae. Massachusetts v. Mellon,* 262 U.S. 447, 485-86 (1923).

On remand, the district court should dismiss the department's complaint in intervention.

VI.

Attorneys' Fees

The Secretary has appealed the district court's order awarding attorneys' fees (No. 80-1695). We vacate the award and remand this issue to the district court for reconsideration in light of this opinion.

VII.

Summary

On remand, we direct the district court to take the following action:

1. Vacate its order of injunctive and declaratory relief, except as provided in paragraph 5 below.

2. Remand to the Secretary for reconsideration pursuant to the Social Security Disability Benefits Reform Act of 1984 the claims of named parties and unnamed members of subclasses A(2) and B whose benefits were terminated, except those who have been granted awards *pendente lite.*

3. Dismiss the claims of initial claimants in subclasses A(1)(a) and (b) who have not met the requirements of section §405(g).

4. Direct the Secretary to identify and notify claimants for initial benefits in subclasses A(1)(a) and (b), who meet the requirements of §405(g), in accordance with procedures and a notice prescribed by the district court.

5. Remand to the Secretary for reconsideration pursuant to the interim pain standard of section 3(a) of the 1984 Act the claims of initial claimants in subclass A(1)(b) who have met the requirements of section 405(g).

6. Remand to the Secretary for reconsideration of her policy of nonacquiescence in light of the 1984 Act's legislative history and circuit precedent the claims of initial claimants in subclass A(1)(a) who have met the requirements of §405(g).

7. After remand, relinquish jurisdiction of all remanded claims and dismiss the claimants without prejudice to their right to seek timely review of the final decisions of the Secretary on remand in their respective judicial district pursuant to §405(g).

8. Dismiss the complaint in intervention of the North Carolina Department of Human Resources, Disability Determination Services.

9. Reconsider the award of attorneys' fees in light of this opinion.

The judgments in 84-1381 and 84-1695 are vacated, and the cases are remanded. Each party shall bear its own costs.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-1381

Patrick H. Hyatt, et al,

Appellees,

versus

Margaret M. Heckler, etc.,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge.

The appellant's petition for rehearing and the appellee's petition for rehearing with suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petitions for rehearing and is of the opinion that they should be denied,

IT IS ORDERED that the petition for rehearing in banc is denied.

Entered at the direction of Judge Butzner with the concurrence of Judge Russell and Judge Hall.

For the Court,

/s/ JOHN M. GREACEN

CLERK

Filed April 23, 1985.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-83-655-M

PATRICK H. HYATT; HERMAN O. CAUDLE and MARY P. LOVINGOOD, on behalf of themselves and all others similarly situated,

Plaintiffs,

and

NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DISABILITY DETERMINATION SERVICES,

Plaintiff-Intervenor,

-vs-

MARGARET M. HECKLER, or her successors in office, Secretary of the United States Department of Health and Human Services,

Defendant.

FINDINGS OF FACT
CONCLUSIONS OF LAW
AND
DECISION THAT THE
UNITED STATES
SECRETARY OF
HEALTH AND HUMAN
SERVICES SHOULD

(1) STOP *DENYING* CLAIMS FOR SOCIAL SECURITY DISABILITY BENEFITS BASED ON HYPERTENSION OR DIABETES MELLITUS UPON THE THEORY THAT WITHOUT END-ORGAN DAMAGE (TO HEART, EYES, KIDNEYS OR BRAIN) THE CLAIMANT DOES NOT HAVE A "SEVERE IMPAIRMENT"

(2) STOP *DENYING* CLAIMS FOR SOCIAL SECURITY DISABILITY BENEFITS BASED ON PAIN, UPON THE THEORY THAT SUBJECTIVE MANIFESTATIONS OF PAIN CANNOT BE

CONSIDERED DISABLING UNLESS THEY ARE SUPPORTED BY OBJECTIVE CLINICAL FINDINGS

(3) STOP *TERMINATING* SOCIAL SECURITY BENEFITS WITHOUT SUBSTANTIAL EVIDENCE THAT THE RECIPIENT'S DISABILITY HAS CEASED

— ALL OF WHICH THE SECRETARY PERSISTS IN DOING, IN CONSCIOUS AND WILFUL DISREGARD OF PERTINENT AND CONTROLLING DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH JUDICIAL CIRCUIT OF THE UNITED STATES.

INDEX

	Page
FINDINGS OF FACT	1
I. THE PARTIES AND THE ISSUES	1
II. CASE HISTORIES OF THE INDIVIDUAL PLAINTIFFS AND OTHERS	
(a) Patrick H. Hyatt	4
(b) Herman O. Caudle	7
(c) Mary P. Lovingood	10
(d) Other Representative Class Members	11
III. HOW SOCIAL SECURITY CLAIMS ARE HANDLED; REVIEW AND TERMINATION, 1982-84 STYLE	13
Background	13
Procedure	15
Terminations	19
Irreparable Harm	21
The Moratorium	22
The Secretary's Position	23
CONCLUSIONS OF LAW	25
I. DEFENDANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION	25
II. THE SUBSTANTIVE LEGAL MERITS OF THE CASE	33
DECISION	41

FINDINGS OF FACT
I.
The Parties and the Issues

1. This is a class action against the Secretary of the United States Department of Health and Human Services, challenging the policy of the Social Security Administration (SSA) denying Social Security benefits and terminating Social Security benefits, in the cases described below, in open violation of applicable decisions of the Fourth Circuit Court of Appeals.

2. The individual plaintiffs and class members are applicants for or former recipients of disability benefits under Titles II and XVI of the Social Security Act, 42 U.S.C. §§401 *et seq;* 1381 *et seq.* The North Carolina Department of Human Resources, Disability Determination Services (DDS), has been authorized to intervene as a party plaintiff. *See, Nuesse v. Camp,* 385 F.2d 694 (D. C. Cir. 1967); Fed. R. Civ. P. 24(a); (b).

3. Plaintiffs contend that the Secretary, acting pursuant to an express policy of refusal to comply with federal circuit court decisions with which she disagrees, has promulgated standards of eligibility for disability benefits which directly contradict controlling decisions of the Fourth Circuit Court of Appeals.

4. First, plaintiffs contend that the Secretary's regulation SSR 82-55 disregards the Fourth Circuit's holding in *Martin v. Secretary of Department of Health, Education and Welfare,* 492 F.2d 905 (4th Cir. 1974), by requiring that medical impairments such as diabetes mellitus and hypertension shall not be considered disabling unless they are accompanied by end-organ damage (*i.e.*, damage to heart, eyes, kidneys or brain).

5. Second, plaintiffs contend that the Secretary's regulation SSR 82-58 disregards the Fourth Circuit's holding in

Myers v. Califano, 611 F.2d 980 (4th Cir. 1980), by providing that subjective manifestations of pain shall under no circumstances be considered disabling unless they are substantiated by objective clinical findings.

6. Finally, plaintiffs contend that the Secretary's regulations SSR 82-49c and SSR 81-6 disregard the holding of *Dotson v. Schweiker,* 719 F.2d 80 (4th Cir. 1983), by providing that a person currently receiving benefits is not entitled to a presumption of continuing disability, and may be found to be no longer disabled, despite the absence of evidence that the recipient's condition has changed for the better since the date when he or she was last determined to be disabled.

7. Plaintiffs have argued that SSA's policy of "non-acquiescence" is contrary to the Social Security Act; to the separation of powers doctrine; to principles of *res judicata, stare decisis,* and collateral estoppel; to the due process and equal protection guarantees of the Fifth Amendment to the United States Constitution; and to the Administrative Procedure Act. They seek both declaratory and injunctive relief requiring the Secretary to adhere to the decisions of the Fourth Circuit Court of Appeals in determining eligibility for Social Security disability payments.

8. Pursuant to specific orders of court dated December 16, 1983, and January 13, 1984, all issues were consolidated under Rule 65(a)(2), and the case was heard on January 18, 1984, on (1) defendant's motion to dismiss; (2) plaintiffs' motion for injunctive relief; (3) plaintiffs' motion for class certification; and (4) the merits of the case. The court received all competent evidence offered on all issues by all parties.

II.
Case Histories of the Individual Plaintiffs

(a) Patrick H. Hyatt

9. Plaintiff Patrick Hyatt is 47 years old, has a tenth grade education, and last worked in 1973 as a long haul truck driver. He lives in Mecklenburg County, North Carolina, with his wife and two daughters. Between 1969 and 1974 plaintiff underwent a series of back operations, including several lumbar laminectomies with removal of ruptured intervertebral discs. Since the time of his original surgery, plaintiff has suffered from continuous, disabling back and leg pain.

10. On January 7, 1974, plaintiff was found by the Social Security Administration to be disabled due to degenerative disc disease, post-lumbrosacral fusion problems, and depressive reaction. He received Social Security disability benefits from March, 1973, until September, 1981.

11. On September 10, 1981, DDS notified Hyatt that his disability had ceased during July, 1981; his benefits were terminated. DDS did not inform Hyatt that his condition had improved since he was last determined by SSA to be totally disabled. On October 5, 1981, plaintiff requested reconsideration of this decision. On January 8, 1982, after reconsideration, DDS upheld its original decision, informing Hyatt that although he suffered from "discomfort," he did not suffer from objective physical impairments that would prevent him from doing work activity.

12. On December 10, 1982, Mr. Hyatt received a hearing before a Social Security Administration administrative law judge (ALJ). At the hearing, plaintiff testified that his severe pain precluded him from engaging in even the slightest exertional activities; this evidence was substantiated by witnesses. In connection with the hearing, the ALJ received as evidence numerous reports rendered by plaintiff's regular treating physician, Dr. Jerry M. Petty, a neurosurgeon.

Among his other findings, Dr. Petty stated that "Mr. Hyatt is totally and permanently disabled for any type work and has been for quite some time." Tr. 160. Dr. Petty's reports following Mr. Hyatt's frequent visits throughout the past ten years document Hyatt's continuing and severe pain.

13. The ALJ also considered a report made by Dr. Ronald C. Demas, to whom plaintiff was referred for a consultive examination by DDS. Dr. Demas diagnosed plaintiff as suffering from probable chronic low back strain, post laminectomy changes. Tr. 148. Dr. Demas does not appear to have considered the disabling effects of plaintiff's subjectively experienced pain.

14. On January 7, 1983, the ALJ rendered his decision. He determined that plaintiff's back condition constituted a severe impairment, but stated that plaintiff retained the residual functional capacity to preform sedentary work. The ALJ did not accord plaintiff a presumption of continuing disability, and he did not make any finding whether plaintiff's condition had improved since he was last found disabled.

15. In his decision, the ALJ took notice of plaintiff's severe pain, but found that it was not disabling. The ALJ stated that Dr. Petty was "overly impressed with the claimant's complaints of pain," and stated that the job of SSA was to determine whether a claimant is disabled "on the basis of medical evidence and other findings." Tr. 23-24. The ALJ then proceeded to find that Hyatt's pain is not disabling when he limits his physical exertion. There is *no* evidence in the file to support this finding.

16. On June 2, 1983, the SSA Appeals Council denied review of the ALJ decision. Following that action, plaintiff instituted this suit to review the Secretary's final decision pursuant to 42 U.S.C. §405(g).

17. At the trial, Mr. Hyatt testified that his disability benefits amounted to $425 per month before they were terminated. Since the payments were terminated, plaintiff has received no income for himself. He receives $202 per month in AFDC payments to provide support for his two children, and the family also receives food stamps. The family's monthly rent is $175.

18. Mr. Hyatt and his family have experienced severe financial distress since his benefits were terminated. Mr. Hyatt was forced to sell his home because he fell behind on the mortgage payments, and a number of his personal possessions, including an automobile and two chairs, have been repossessed by the finance company. Mr. Hyatt testified that he has fallen behind on a number of bills, including all the utility bills; the family has been unable to buy clothing, or to afford a diet that includes meat.

(b) *Herman O. Caudle*

19. Plaintiff Herman O. Caudle was 56 years old at the time this suit was filed. He had a 10th grade education, and had worked in the past as a salesclerk, night watchman, and maintenance man. Until the time of his death on October 24, 1983, Mr. Caudle lived with his wife in Winston-Salem, North Carolina.

20. SSA originally found that Mr. Caudle was entitled to a period of Social Security disability benefits beginning in May, 1981, due to hypertension, control less than satisfactory, with Grade II retinopathy, exogenous obesity, passive-dependent personality, and depressive reaction with sleep disorder. The evidence before the court established also that Mr. Caudle weighed about 270 pounds, and suffered for a period of years from hypertension which his doctors were unable to control through medication. Exh. 25, p. 4; Exh. 11, p. 1.

21. In March, 1983, DDS informed Mr. Caudle that his disability had ended. DDS affirmed its initial determination upon reconsideration. Plaintiff Caudle then requested a hearing before an ALJ. A hearing was held on August 17, 1983, and on August 24, 1983, the ALJ issued his decision that Mr. Caudle was no longer disabled because he did not suffer from a "severe impairment."

22. In reaching his decision, the ALJ did not accord Caudle a presumption of continuing disability, and did not make any finding that Caudle's condition had improved since he was last found by SSA to be disabled.

23. The ALJ found from the evidence before him that Caudle suffered from hypertension, under less than satisfactory control with Grade II-III retinopathy, but he found that Caudle suffered from no end-organ damage (*i.e.*, damage to eyes, heart, kidneys, or brain).

24. The ALJ further found that plaintiff's subjective complaints were not substantiated by objective clinical findings.

25. On October 21, 1983, Mr. Caudle filed a timely request with the Appeals Council for review of the ALJ's decision; three days later he was dead, apparently from the hypertension and other ailments which had disabled him for several years.

26. Counsel for plaintiffs introduced the affidavit of plaintiff Caudle's regular treating physician, Dr. Mary Fennell Lyles, assistant professor of internal medicine at Bowman Gray School of Medicine. Dr. Lyles, who treated Caudle from 1979 until his death in 1983, discussed the severity of Caudle's hypertension, which she stated showed no medical improvement, and in fact showed a progressive deterioration, despite a course of aggressive therapy. She also stated:

"Anxiety, depression, and financial stress all further complicated management of Mr. Caudle's blood pressure. I attribute a large portion of this emotional distress to worry over his benefit status, especially since May of 1983." Exh. 11, p. 1.

27. Dr. Lyles further stated that Dr. Joyce Reynolds, medical examiner at Forsyth Memorial Hospital, had reported her opinion that Mr. Caudle had died a cardiac death as a complication of his hypertension. Dr. Lyles supported the finding of Dr. Reynolds with her own opinion that "Mr. Caudle's disabling condition, severe hypertension, led to aggravation of his angina and eventually to myocardial infarction which was the probable cause of death." Exh. 11, p. 2.

28. Dr. Lyles added that she had attempted to hospitalize Mr. Caudle before his death, to perform intensive diagnostic procedures. Mr. Caudle had refused hospitalization due to a lack of insurance coverage and the threatened loss of his disability benefits. Dr. Lyles concluded that her patient "did not receive optimal treatment because his benefits were cut off." Exh. 11, p. 3.

29. Counsel for plaintiffs also introduced the affidavit of Herman Caudle's widow, Mary Devers Caudle. Mrs. Caudle stated in her affidavit that Mr. Caudle's physical condition had not improved, but instead had continued to decline, from the time when he was originally awarded disability benefits. Additionally, she stated, Mr. Caudle grew very worried and upset about the termination of his benefits, spending more and more time alone in his room, and causing Mrs. Caudle great concern. Mrs. Caudle stated her belief that "worrying about Social Security shortened Herman's life." Exh. 10, p. 2.

(c) *Mary P. Lovingood*

30. Plaintiff Mary Lovingood is 57 years old, and cannot read or write. In the past she worked as a pie maker and a

poultry cleaner. She lives with her husband in Charlotte, North Carolina.

31. SSA originally found that Ms. Lovingood was disabled due to chest pain, high blood pressure, and back and leg pain. Lovingood received Social Security disability benefits from 1974 until October, 1983. Her benefits were terminated pursuant to a notice by DDS in August, 1983, that she was no longer disabled.

32. In the explanation accompanying the notice of termination sent to Ms. Lovingood, DDS stated:

> "Although you may have pain in your back and legs at times, the report show [sic] that you are able to stand, walk, and use your legs in a normal manner.

The explanation further stated:

> "Although your blood pressure is higher than normal, it has not damaged your heart, kidneys or eyes [end-organs]."

Exh. 25, p. 2.

33. DDS did not accord Ms. Lovingood a presumption of continuing disability based on her prior entitlement to benefits, nor did it make any finding that her condition had improved since she was initially found to be disabled.

34. On September 1, 1983, Ms. Lovingood requested reconsideration of the DDS decision and her request was denied. She then filed a request for a hearing before an ALJ on October 15, 1983. Apparently, that request is still pending.

35. Ms. Lovingood's affidavit was received in evidence. In her affidavit, plaintiff states that her condition has *not* improved since SSA originally found that she was disabled. In addition, Ms. Lovingood states that she has grown anxious and depressed since learning that her disability benefits would be terminated. The termination of Ms. Lovingood's benefits reduced her family income by approximately 30 per

cent; she and her husband now live on his income of $530 per month, and will experience difficulty in paying the costs of their food, rent, utilities, insurance, and medical bills. Ms. Lovingood did not elect to continue receiving her disability payments pending appeal of her case to an ALJ, because she was afraid she would be unable to repay SSA if she ultimately lost her case.

(d) *Other Representative Class Members*

36. Affidavits of several declarants were received in evidence. From these affidavits and other evidence, the court finds the following facts:

37. SSA has engaged in a consistent practice of terminating Social Security disability benefits without making any finding that a recipient's condition has improved since he or she was originally determined to be disabled. Exhs. 8-24.

38. The loss of Social Security benefits often causes former recipients to suffer severe financial hardship. Many former recipients have become completely dependent on others, such as the public welfare system, private charities, or their children, for support. Still others have suffered the loss of their homes (Exh. 16); their utilities (Exh. 19); or their automobiles (Exh. 13).

39. The termination of benefits to disabled persons whose conditions have not changed has often resulted in the inability of these persons to secure proper medical treatment for the very conditions from which they are disabled, or other conditions. Exh. 20 (claimant in debt for medicine); Exh. 14 (inability to purchase medicine); Exh. 13 (appointments with private treating physician no longer affordable); Exhs. 14, 16 (eye examinations and glasses not affordable); Exh. 21 (needed dental treatments cancelled).

40. Persons whose disability benefits are terminated without any demonstration that their conditions have improved often experience deep emotional distress due to resultant

financial pressures, which tends only to aggravate the severity of their physical or emotional disabilities. Exhs. 17-20; 23.

41. On several known occasions, former recipients of disability benefits have died, shortly after their benefits were terminated without any showing of improvement, from the very conditions which SSA had determined were not disabling severe impairments. Exhs. 15, 17, 18, 24.

III.
How Social Security Claims are Handled; Reviews and Terminations, 1982-84 Style.

Background

42. Title II of the Social Security Act provides for disability insurance benefits (SSDI) for disabled workers. 42 U.S.C. §401 *et seq.* SSDI benefits are based upon an individual's earnings record and are paid without regard to financial need. Title XVI of the Social Security Act provides for supplemental income (SSI) for persons who are both poor and disabled. 42 U.S.C. §1381 *et seq.* SSI benefits are paid to eligible poor persons whose income and resources fall below a certain level.

43. The *disability* standards for both the SSDI and SSI programs are identical. Disability is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve (12) months." 42 U.S.C. §423 (d)(1)(A); §1382 (c)(a)(3)(A).

44. The Social Security Administration (SSA), pursuant to contract, has entrusted initial disability determinations to the North Carolina Department of Human Resources, Disability Determination Services (DDS). In making disability

determinations, DDS, the state agency, follows, and is only authorized to follow, disability standards promulgated by the federal agency, SSA. These standards are established by directives in the Programs Operation Manual System (POMS) utilized by DDS employees, and in various SSA rulings (SSRs) and policy statements.

45. An initial claimant for disability benefits will be referred to DDS, the state agency, for review. If the claim is denied, the claimant may request reconsideration by DDS. If the claim is still denied, the claimant may request a hearing before a federal SSA Administrative Law Judge (ALJ). A claimant who receives an adverse decision from an ALJ may appeal the decision to the SSA Appeals Council. Finally, a claimant who is denied benefits by the Appeals Council may seek relief from that decision by suing in federal court. 42 U.S.C. §405 (g).

46. A claimant who is found disabled at any stage of this procedure is entitled to benefits. However, a person is eligible for benefits only as long as the disability continues. A recipient of disability benefits is subject to a "continuing disability investigation" (CDI) at least once every three years. 42 U.S.C. §421 (h)(1).

47. The procedure for review of eligibility for benefits and possible termination is essentially similar to the procedure followed in initial applications for benefits. *See* 20 C.F.R. §404.900 *et seq.*; §416.901 *et seq.* A recipient is contacted by DDS and told that his or her case is being reviewed to determine whether he or she is still disabled. If DDS determines that the recipient is no longer disabled, DDS sends the recipient a letter informing him or her of the determination; SSA terminates payments of benefits shortly thereafter. A recipient may request reconsideration from DDS, and may seek further review of a termination of benefits from (in turn) an ALJ, the Appeals Council, and the federal courts.

(An SSI recipient need not seek reconsideration from DDS, but instead may appeal directly to an ALJ.)

48. Persons whose benefits have been terminated are currently offered the option of continuing to receive benefits pending appeal at the ALJ level. 42 U.S.C.A. §423(g)(1) (West Supp. 1983) ("aid paid pending" program). However, if the ALJ affirms the termination, all benefit payments are terminated, and the benefits paid pending appeal may be considered overpayments subject to recoupment by the Secretary of Health and Human Services.

Procedure

49. The Secretary develops guidelines for substantive disability determinations. These guidelines are published as Social Security regulations, 20 C.F.R. §400 *et seq.;* Social Security rulings (SSRs); and Programs Operating Manual Systems (POMs). They are used as a controlling reference by DDS (state) and SSA (federal) employees who perform disability evaluations upon claimants.

50. Under the contract between the SSA and North Carolina, the North Carolina Department of Human Resources, Disability Determination Services, makes initial disability determinations both for new applicants and for those recipients whose continuing disability status is reviewed. The state employees are controlled by the federal regulations in making disability determinations and may not vary from them. If, for example, a DDS consulting physician expresses the opinion that a claimant is disabled, that opinion will be rejected by the state and federal examiners unless the medical impairments fit precisely within the guidelines established by the defendant.

51. SSA and DDS employees who evaluate claims for disability payments are charged with the duty of determining whether a claimant suffers from a "severe impairment" which limits the claimant's ability to engage in, or wholly

prevents a claimant from engaging in, substantial gainful activity.

52. SSA has published SSR 82-55, which is the same document as POM 2107. These documents are entitled, "Medical Impairments That Are Not Severe." According to these documents SSA has determined that the following impairments are not "severe," and thus not disabling:

> ¶4a. Hypertension without significant organ damage, past or present.
>
> ¶7.[a]. Diabetes mellitus, adult onset, controlled on prescribed therapy, without significant end-organ damage or recent episodes of acidosis.

These regulations are codified in 20 C.F.R. Subpart P, Appendix 1, §4.00 C, which states:

> *Hypertensive vascular disease* does not result in severe impairment unless it causes severe damage to one or more of four end-organs: heart, brain, kidneys, or eyes (retinae).

53. DDS employees who evaluate the condition of disability claimants automatically determine that individuals who suffer from hypertension or diabetes mellitus are not disabled from those illnesses, unless those individuals also suffer from clinically substantiated end-organ damage. In such cases, DDS employees do not make any attempt to determine an individual's actual ability to perform work.

54. The Secretary offered no evidence to indicate that either diabetes mellitus or hypertension is not disabling unless it has already resulted in end-organ damage.

55. Carl Young, Supervisor of the Quality Assurance Unit of DDS, testified at the trial and submitted an affidavit which supports his testimony. Mr. Young supervised an evaluation of a random sample of 407 cases closed by DDS in late December, 1983. The closed cases included those of original applicants whose claims for benefits were denied,

and cases of former recipients whose benefits were terminated. From this evaluation, Mr. Young determined that 15 percent of all denials in the sample involved either hypertension or diabetes mellitus without any significant end-organ damage. From all of the testimony, the court finds that a substantial number of persons in North Carolina have been denied a complete evaluation of their actual ability to perform substantial gainful activity, solely because their illnesses have not yet resulted in significant damage to their eyes, kidneys, hearts or brains.

56. Symptoms, including pain, must be strictly judged by a guideline (SSR 82-58 and POM 2205) entitled "Evaluation of Symptoms":

> "POLICY STATEMENT: *Symptoms will not have a significant effect on a disability determination or decision unless medical signs or findings show that a medical condition is present that could reasonably be expected to produce the symptoms which are alleged or reported.* However, once such a medical condition (e.g., disc disease) is objectively established, the symptoms are still not controlling for purposes of evaluating disability. *Clinical and laboratory data and a well-documented medical history must establish findings which may reasonably account for the symptom in a particular impairment.* Objective clinical findings which can be used to draw reasonable conclusions about the validity of the intensity and persistence of the symptom and about its effect on the individual's work capacity must be present. For example, in cases of back pain associated with disc disease, typical associated findings are muscle spasm, sensory loss, motor loss, and atrophy. There must be an objective basis to support the overall evaluation of impairment severity. *It is not sufficient to merely establish a diagnosis or a source for the symptom.*" [Emphasis added.]

57. DDS employees who evaluate the condition of disability claimants do not consider subjective claims of pain which seem to them to be disproportionate to the clinical medical evidence before them. These employees disregard

statements by the individual being evaluated concerning the severity or intensity of his or her pain, unless those statements are supported by objective clinical findings.

58. Dr. George M. Cooper, a medical consultant for DDS, testified — and the court finds — that chronic severe pain may limit a claimant's functional capacity to a greater extent than would be indicated by objective clinical findings alone. An evaluating physician may be convinced, on the basis of his or her professional judgment and an analysis of all the evidence, that a claimant is totally disabled, yet the physician may be required by the Secretary's regulations to find the claimant not disabled due to a lack of objective clinical findings to support the claimant's complaints of pain.

59. Carl Young (see ¶55, above) further testified that 16.4 percent of all the denials of benefits evaluated by his office in late December, 1983, involved claims of significant pain, the intensity of which was not supported by objective clinical findings. From this testimony the court finds that a significant number of persons in North Carolina have been denied a complete evaluation of their actual ability to engage in substantial gainful activity solely because their subjective complaints of pain, no matter how severe or disabling, were not fully supported by objective clinical findings.

Terminations

60. The Secretary has admitted, in SSRs 81-6, 82-64 and 82-49c, and through testimony in this court, that she does not comply with the mandate of the Fourth Circuit in *Dotson V. Schweiker*, 719 F. 2d 80 (4th Cir. 1983), and that SSA continues to terminate disability benefits without any demonstration that the recipient's condition has improved since the time that he or she was originally found disabled.

61. Since October 5, 1981, in North Carolina, DDS has adjudicated approximately 165,000 claims, of which approximately 99,000 were denials or terminations. During 1983,

prior to September 7, 1983, DDS had terminated the Social Security disability benefits of approximately 106 North Carolinians per week. The total number of terminations since October 15, 1981, is approximately 15,000.

62. Aileen Webster, witness for the plaintiffs, testified. She also filed an affidavit which contains the substance of her oral testimony. That affidavit is as follows:

> I, Aileen Webster, being duly sworn, aver and say:
>
> 1. I have been employed by Disability Determination Services ("DDS") for the past 18 years, serving as a disability specialist, a supervisor and, for the last five years, as a section chief.
>
> 2. In connection with my duties as Section Chief, I directed a review of the files of those 821 recipients who, as of approximately November 1, 1983, would have been terminated for medical reasons but for the moratorium. Specifically, I instructed supervisors to review the medical evidence available at the time each such claim was initially allowed and the medical evidence currently available with respect to each such claim and to determine, using common sense guidelines, whether there had been any medical improvement. On the basis of that review, the supervisors reported to me that *60.2% of the recipients who would be terminated for medical reasons under the present guidelines had not experienced any medical improvement in their condition.* [Emphasis added.]
>
> This 12 day of January, 1984.
>
> /s/ Aileen Webster

63. The court finds the facts to be as the above evidence tends to show: Large numbers (whether 60.2% or somewhat more or less) of the persons undergoing review of disability under the Secretary's present guidelines are being cut off the Social Security rolls without eivdence that their conditions have improved and without any presumption that their disabilities continue. Those persons would continue to draw benefits if the Secretary were following relevant decisions of the Fourth Circuit Court of Appeals.

Irreparable Harm

64. The termination and the unjustified denial of Social Security disability benefits cause irreparable harm to eligible persons. Many become unable to pay for medicines, clothing, food, fuel, transportation and shelter. Termination and denial of benefits cause anxiety, depression and decline in health. Some former recipients have died following termination of benefits; posthumous reinstatement after appeal doesn't help them.

65. If the Social Security Administration were to provide DDS with the files of disability claimants who reside in North Carolina, DDS employees would be able to determine by reviewing the files whether they showed (a) hypertension or diabetes mellitus without significant end-organ damage; (b) a subjective claim of disabling pain unsupported by objective clinical medical findings; or (c) a termination of benefits without any evidence that a claimant's condition had improved since he or she was last found disabled. The court is satisfied from the evidence that the work and expense necessary to locate and reevaluate the files of those affected will produce no serious hardship upon the state or federal administrators.

The Moratorium

66. On September 7, 1983, James M. Hunt, Jr., the Governor of North Carolina, was sufficiently concerned about the terminations of disability benefits payments in North Carolina that he issued Executive Order No. 97 entitled "Moratorium on Terminating Social Security Disability Benefits." Temporarily, such terminations have ceased.

67. In addition, the Social Security Administration on December 7, 1983, ordered a nationwide temporary halt of terminations of benefits due to Congress' failure to extend certain provisions of section 2, P.L. 97-455, which has expired. Nevertheless, in both North Carolina and the rest of

the nation, disability termination *decisions* are still being made at a rapid rate; the temporary nationwide halt only relates to *notifications to individuals* that their eligibility for benefits has ceased. Benefits are still being paid to those who are considered no longer eligible, but those payments could be terminated any day at the discretion of the Governor or the Secretary. Moreover, North Carolina residents whose benefits were terminated pursuant to SSA's policies *prior to September 7, 1983*, are not eligible to receive benefits under the Governor's order, and the cases of others who have filed claims to have their benefits restored are currently wending their way through the lengthy DDS and SSA appeals process.

The Secretary's Position

68. The Secretary of HHS accepts the decision of no court short of the Supreme Court as precedent binding on her. She views decisions of the United States circuit courts and district courts as binding only on the litigants involved in a case, and not as precedent which she must follow in other similar cases. When a conflict arises between the decisions of lower courts and the opinions of the Secretary, the Secretary considers herself entitled to follow her own interpretations of the Social Security Act rather than those rendered by lower courts.

69. The Secretary has instructed all administrative law judges handling Social Security disability cases to make "reasonable efforts" to follow district or circuit court decisions regarding *procedural* or *evidentiary* matters. However, SSA has instructed its ALJs that when district court or circuit court decisions *interpreting the Act, Social Security regulations, or SSA rulings* conflict with the Secretary's interpretations, the ALJs should not consider these court decisions binding in future cases and should not cite such lower court decisions in their opinions. ALJ decisions relying on federal case law are often reversed by the SSA Appeals Council for that reason. ALJs have been informed that "the federal

courts do not run SSA's programs." Associate Comm'r., Office of Hearings and Appeals, *Memorandum to Administrative Law Judges* (January 7, 1982).

70. The Secretary's refusal to comply with court decisions with which she disagrees is a continuing policy from which SSA deviates only by publishing new regulations and rulings that conform to judicial precedent. 1-161, *SSA Precedents.*

CONCLUSIONS OF LAW

I.

Defendant's Motion To Dismiss For Lack Of Jurisdiction.

71. Defendant has moved to dismiss the complaints with respect to all named and class plaintiffs except Mr. Hyatt, on grounds that the court lacks subject matter jurisdiction over the actions with respect to these claims. Defendant relies on 42 U.S.C. §405(g), which provides in pertinent part:

> "Any *individual,* after any *final decision* of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow." [Emphasis added.]

72. Despite its literal language, the relief afforded by this statute is not confined to individual Social Security claimants who file individual suits in district courts. The Supreme Court has held that §405(g) provides an appropriate jurisdictional basis for claims challenging the constitutionality of provisions of the Social Security Act. *Weinberger v. Salfi,* 422 U.S. 749 (1975). The Court has also held that this statute provides jurisdiction over a claim challenging SSA's procedures. *Mathews v. Eldridge,* 424 U.S. 319 (1976). Finally, the Court has held that §405(g) permits federal courts to entertain class actions and to grant injunctive relief. *Califano v. Yamasaki,* 442 U.S. 682 (1979).

73. Defendant claims that only plaintiff Hyatt has received a "final decision" of the Secretary which this court has the authority to review under the statute, in that his is the only claim that has been presented to the SSA Appeals Council for review. The "final decision" requirement of §405(g) consists of two elements. The first element, which is purely jurisdictional in the sense that it cannot be waived, is the requirement that a claim for benefits shall have been presented to the Secretary. The second element, which can be waived either overtly or constructively by the Secretary, is the requirement that the administrative remedies be exhausted. *Matthews v. Eldridge,* 424 U.S. at 328; *Weinberger v. Salfi,* 422 U.S. at 763-64; *Aldrich v. Schweiker,* 555 F. Supp. 1080, 1087 (D. Vt. 1982).

74. The first, non-waivable, element of the finality requirement of §405(g) has been satisfied with respect to the claims of all the named and proposed class plaintiffs. The named plaintiffs have all presented claims for benefits to the Secretary. The class proposed includes only those claimants who (a) have presented initial claims for benefits or who, (b) by joining in the proposed class or otherwise, will have notified the Secretary that they believe their benefits should not be terminated. *See, Mathews V. Eldridge, supra,* at 323-24, 329 (jurisdictional requirement satisfied by answering state agency questionnaire, and by writing letter in response to tentative determination of disability cessation); *Mathews v. Diaz,* 426 U.S. 67, 75 (1976) (claim filed with Secretary by Espinosa, *after* he had joined in District Court suit, satisfied jurisdictional requirement); *Kennedy v. Harris,* 87 F.R.D. 372, 376 (S.D. Cal. 1980) (mere termination of benefits fulfills requirement of presenting a claim).

75. The Secretary's claim that only she may waive the §405(g) formal prerequisite to suit was rejected by the Supreme Court when it stated:

> *Salfi* suggested that under §405(g) the power to determine when finality has occurred ordinarily rests with the Secretary since ultimate responsibility for the integrity of the administrative program is [hers]. But cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate."

Mathews v. Eldridge, 424 U.S. at 330.

76. In *Mathews v. Eldridge,* the Supreme Court established a method for determining whether a court may infer waiver of the Social Security Act's exhaustion requirement. First, a court may infer waiver when the plaintiff's claim is entirely collateral to his individual claim for benefits. 424 U.S. at 330-31. Further, the exhaustion requirement may be deemed waived when the damages upon which a plaintiff's claim for relief is based are of such a nature that he cannot adequately be compensated by the relief that would accrue from a judicial proceeding following exhaustion. *Id.* at 331. Finally, federal courts have held that exhaustion may be inferred when the Secretary's position with respect to the litigant's claim is so fixed that further pursuit of administrative remedies would be futile. *Weinberger v. Salfi, supra,* at 767; *Liberty Alliance of the Blind v. Califano,* 568 F.2d 333, 345 (3d Cir. 1977).

77. Plaintiffs have satisfied all the above tests for waiver, and have provided additional reasons why the Social Security Act's exhaustion requirement should be waived. First, and most significantly, plaintiffs' claims in this case are not confined to direct claims for the payment of benefits. Instead, plaintiffs seek to affect the procedures by which the Secretary determines eligibility for benefits. Of course, plaintiffs' claims are generated from a belief that benefits would be awarded to them if SSA were to apply lawful standards to the review of their cases. Nevertheless, that fact does not convert their suit into a direct claim for benefits, in which the court would be asked to review the record of each

individual case to determine whether the Secretary's decision is supported by substantiai evidence. In *Mathews v. Eldridge, supra,* the Supreme Court held that a plaintiff's due process claim to a pre-deprivation hearing was collateral to a substantive claim for benefits. 424 U.S. at 330. That the plaintiff in *Eldridge* hoped ultimately to have his benefits reinstated did not affect the court's decision concerning the essential nature of his claim.

78. *Smith v. Schweiker*, 709 F.2d 777 (2d Cir. 1983), relied on by the Secretary, does not affect this decision. In *Smith,* a panel of the Second Circuit Court of Appeals determined that a claim concerning the Secretary's application of a medical improvement standard, similar to a claim made in this case, was not collateral to the plaintiffs' substantive claims for benefits. In rejecting the plaintiffs' argument that exhaustion of the claim could be inferred, the court stated:

> "Exhaustion, moreover, would frame the issue in a much clearer fashion than is possible when it is posed as an abstraction. While the legal issue raised by plaintiffs may seem well-defined to them, it seems rather unformulated to us. What is meant by evidence of medical improvement, for example, is somewhat ambiguous."

709 F.2d at 780.

79. Unlike the abstract claims presented to the Second Circuit panel in *Smith,* the claims raised by plaintiffs in this case are all-too-sadly concrete. Plaintiffs here challenge the Secretary's refusal to follow three well-reasoned opinions by the Fourth Circuit Court of Appeals which this court is bound to follow. Where a legal standard has been clearly enunciated, this court is authorized, and indeed required, to determine whether the Secretary's posture with regard to that standard comports with the constitutional principles of separation of powers and due process. In addition, in this case, the court has received in evidence numerous documents from which this court as factfinder can decipher the

Secretary's questioned policies which are systematically applied to all claims for benefits.

80. The plaintiffs have further demonstrated that the harm they suffer cannot adequately be relieved by individual judicial review following complete administrative exhaustion of their claims. The Secretary has argued that whatever harm plaintiffs may suffer from a possible misapplication of the law to their cases will be compensated by the ultimate retroactive payment of benefits upon successful litigation in federal court. This claim overlooks several serious aspects of plaintiffs' situation.

81. First, as plaintiff Hyatt testified at the trial of this case, termination of disability benefits means for many of the members of plaintiffs' class the difference between existence at a bare subsistence level, and the ability to pay the utility bills to keep warm in freezing temperatures, or to purchase an occasional item of clothing or piece of meat. Even more seriously, the evidence reveals that many persons whose disability benefits are terminated lose the ability to pay for desperately needed medications and health care. Indeed, many former recipients (some of whose benefits were later reinstated on appeal) attested to the severe physical and mental stress occasioned by the termination itself. In some cases, this severe stress was closely followed by death. No amount of retroactive benefits can compensate for years of deprivation and anxiety — which may even ultimately result in death — resulting from the Secretary's wrongful practices. Another reason that retroactive benefits are not fully compensatory is that one-quarter of the amount ultimately awarded following district court litigation is often paid, pursuant to 42 U.S.C. §406(b)(1), to the lawyer who successfully represents the claimant in federal court.

82. Finally, the Secretary's argument overlooks the fact that the only claimants who will be retroactively compensated for the Secretary's application of an unlawful standard

of review are those "with the temerity to request. . . review." *Aldrich v. Schweiker,* 555 F. Supp. 1980, 1088 (D. Vt. 1982), *quoting, Spear v. Harris,* No. 80143, slip. op. at 7 (D. Vt. July 31, 1980). The possibility of the application of a double standard to members of a group of potential disability payment recipients who are similarly situated provides further necessity for an inference of waiver. *See Rivera v. Heckler,* 568 F.Supp. 235, 242 (D. N.J. 1983).

83. This case adequately questions and attacks the legality of the Secretary's rulings and guidelines for the determination of eligibility for benefits. To require each plaintiff to exhaust her administrative remedies would serve no useful purpose. *Weinberger v. Salfi, supra,* at 767.

84. Although the Secretary insists that her challenged rulings fit within the letter of the law, she has made no representation that they are subject to change at any time in the near future. The particular rulings in question, then, represent the Secretary's fixed position, to which the court has no doubt that the Secretary would adhere in reviewing each individual, substantive claim for benefits.

85. A requirement of exhaustion in this case would be the mere enforcement of formality, and a waste of administrative and judicial resources. *See, Kuehner v. Schweiker,* 717 F. 2d 813, 817-818 (3d Cir. 1983); *Graham v. Heckler,* 573 F.Supp. 1573, 1577-78 (N.D. W.Va. 1983). It would only add hardship to hardship.

II.
The Substantive Legal Merits Of The Case

86. The principle of separation of powers embodied in the United States Constitution is that federal courts retain the ultimate authority to interpret the law. *Marbury v. Madison,* 5 U.S. 137 (1803).

87. Decisions of the Fourth Circuit Court of Appeals interpreting the Social Security Act are binding upon the Social Security Administration when it decides claims of people who live within the territorial jurisdiction of this circuit. *See, PPG Industries, Inc. v. N.L.R.B.*, 671 F.2d 817, 823 n. 9 (4th Cir. 1982). (The NLRB, a federal adjudicative agency, was required to determine unfair labor practice cases arising within the circuit in accordance with the decisions of the Court of Appeals interpreting the National Labor Relations Act.)

88. In reaching its decision in *PPG Industries*, the Fourth Circuit expressed the position that has been adopted by the great majority of circuit courts addressing the question of an agency's refusal to follow the law of the circuit in which it functions. *Lopez v. Heckler*, 713 F.2d 1432 (9th Cir. 1983); *Ithaca College v. NLRB*, 623 F.2d 224 (2d Cir. 1980); *Mary Thompson Hospital, Inc. v. NLRB*, 621 F.2d 858 (7th Cir. 1980); *Allegheny General Hospital v. NLRB*, 608 F.2d 965 (3d Cir. 1979); *Federal-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1252 (5th Cir. 1978). *But see, Yellow Taxi Company of Minneapolis V. NLRB*, No. 80-1481 (D.C. Cir. November 4, 1983) (NLRB not required to conform its rulings to every decision by court of appeals, but when law has been firmly established, Board is required to give court great deference). As the Court stated in *Allegheny Hospital, supra:*

> A decision by this court, not overruled by the United States Supreme Court, is a decision of the court of last resort in this federal judicial district. Thus our judgments. . . are binding on all inferior courts and litigants in the Third Judicial District, and also on administrative agencies when they deal with matters pertaining thereto. . . [T]he Board is not a court nor is it equal to this court in matters of statutory interpretation. Thus, a disagreement by the NLRB with a decision of this court is simply an academic exercise that possesses no authoritative effect. . . For the Board to predicate an order on its disagreement with this court's interpretation of a statute is for it to operate outside the law.

608 F.2d at 970, *quoted in Ithaca College v. NLRB, supra,* 623 F.2d at 228-29.

89. the law of this Circuit is that the Secretary may *not* require end-organ damage as an exclusive precondition to the establishment of a disability from hypertension or diabetes. *Martin v. Secretary of Dept. of Health, Ed. & Welf.,* 402 F.2d 905 (4th Cir. 1974). In *Martin,* the Fourth Circuit found that neither medical evidence nor the Social Security Act required a finding that a person is not disabled from hypertension or diabetes simply because he has not yet experienced end-organ damage.

90. The Secretary's regulations SSR 82-55 and POM 2107 directly contravene the law of the Fourth Circuit by mandating that disability claimants who suffer from hypertension or diabetes must conclusively be found not disabled unless they exhibit significant end-organ damage.

91. SSA operated outside the law of this circuit by evaluating the disability status of plaintiffs Herman Caudle and Mary Lovingood according to regulations which dictate that claimants who suffer from diabetes or hypertension, but who have not yet experienced any end-organ damage, are conclusively deemed not disabled from either of those two conditions.

92. The law of this Circuit requires the Secretary to evaluate the disabling effects of a disability claimant's pain even though the intensity of the pain is shown *only by subjective evidence. Myers v. Califano,* 611 F.2d 980 (4th Cir. 1980). In *Myers,* the Fourth Circuit reversed a denial of disability benefits which had rested on an SSA regulation requiring that impairments "must be demonstrable by medically acceptable clinical and laboratory diagnostic techniques." *Id.* at 983.

93. The Secretary's regulations SSR 82-58 and POM 2205 directly contravene the law of the Fourth Circuit by mandating that symptoms will not have a significant effect on a disability determination unless they are supported by objective clinical findings.

94. The fact that the Secretary's regulations may have changed since the time of the *Myers* decision makes no difference for purposes of this analysis; the current regulations are as repugnant to the law as the regulation evaluated in *Myers*. In *Myers*, the court found that the claimant had established a sufficient case of disability in that the intensity of her pain, which was substantiated only by subjective evidence, "had a specific physical cause." *Id.* The Secretary's regulation expressly contradicts the holding of *Myers*, as it states: "It is not sufficient to merely [sic] establish a diagnosis or a source for the symptom."

95. SSA expressly refused to follow the law of this Circuit, in evaluating the disability status of plaintiffs Patrick Hyatt and Mary Lovingood, when it failed to consider the disabling effects of the pain experienced by these plaintiffs notwithstanding the fact that such pain was not supported by objective clinical findings.

96. In *Dotson v. Schweiker*, 719 F.2d 80 (4th Cir. 1983), *reh. denied*, ___ F.2d ___ (4th Cir. Jan. 11, 1984), the Fourth Circuit, following the Administrative Procedure Act and applying a "familiar principle" of the presumptive continuing validity of judicial and administrative decisions, held that a previous determination of disability gives rise to a presumption that a claimant is still disabled. In order to rebut this presumption and justify termination of benefits, the Secretary is required to come forward with evidence that a claimant's condition has improved since the last disability determination. The rule adopted by the Fourth Circuit in *Dotson* has been applied by every federal court which has

directly considered the standards applicable to the termination of disability benefits. *Patti v. Schweiker,* 669 F.2d 582 (9th Cir. 1982); *Kuzmin v. Schweiker,* 714 F.2d 1233 (3d Cir. 1983); *Simpson v. Schweiker,* 691 F.2d 966 (11th Cir. 1982); *Doe v. Heckler,* _____ F. Supp. _____, No. M-83-2218 (D. Md. Dec. 13, 1983); *Graham v. Heckler,* 573 F. Supp. 1573 (N.D.W.Va. 1983); *Trujillo v. Schweiker,* 558 F. Supp. 1058 (D. Colo. 1983).

97. Since *Dotson* did not invent, nor claim to invent, any new rule of law, defendant's claim that it should not apply to pre-*Dotson* claims has no merit.

98. As she admits, the Secretary continues to determine, without any showing that the recipients' conditions have improved, that persons receiving benefits are no longer disabled. Thus the Secretary has explicitly chosen to disregard the law of the Fourth Circuit with respect to terminations of benefits.

99. Following her own regulations, and in direct contravention of the law of this Circuit, the Secretary terminated the disability benefits of plaintiffs Patrick Hyatt, Herman Caudle, and Mary Lovingood without any evidence that the condition of these plaintiffs had improved.

100. The Secretary contends that the Fourth Circuit's decision in *Dotson* is not binding law until the time for appeal has run on that case. No authority is cited to support this proposition. *This court* is bound by decisions of the Fourth Circuit Court of Appeals from the day they are issued; hence, in this case, the court is bound to apply the law as it stands in this circuit. As the Second Circuit stated in a similar case:

> "When [the NLRB] disagrees in a particular case, it should seek review in the Supreme Court. During the interim before it has sought review or while review is still pending, it would be reasonable for the Board to stay its proceedings in another case that arguably falls

within the precedent of the first one. However, the Board cannot, as it did here, choose to ignore the decision as if it had no force or effect. Absent reversal, that decision is the law which the Board must follow."

Ithaca College v. NLRB, supra, at 228.

101. The Secretary has shown the court that she is abiding by the *Dotson* decision with respect to Dotson, the individual plaintiff in that case (who is now deceased); that she has not decided whether to appeal that case; and that she is currently appealing another case in the Fourth Circuit which raises the identical issues decided by the court in *Dotson.* These actions, the Secretary contends, show "awareness and respect" for the Fourth Circuit's opinion in *Dotson.* Sec'y's Supplemental Memo of Points and Authorities in Oppos. to Plaintiffs' Motions for Prelim. Inj. and Class Cert., 12.

102. The Secretary's position concerning the *Dotson* decision can hardly be characterized as "respectful." Respect for the law means *obeying* the law. In taking the position that the *Dotson* decision need not be followed by her, the Secretary has *dis*obeyed the law of this Circuit.

103. This court can understand why the Secretary might choose to appeal this issue in a case other than Dotson's; Dotson died, shortly after the Fourth Circuit's decision was rendered, from the very condition which the Secretary contended was not disabling. However, the Secretary may not continue an unlawful practice while she pursues, in an unrelated case, the issues conclusively determined by *Dotson.* Such a position, if accepted by a court, would allow the Secretary forever to escape the mandates of the law by abandoning appeals *before* a case reaches the Supreme Court for decision, but continuing to assert that she is litigating the issue by defending claims that have only freshly entered the federal court system.

104. A cabinet member is not above the law of the land, but is obligated to follow it. The Secretary is free to argue her

position in any case she chooses, but, absent express authority from Congress or the federal courts, she can not offer an appeal in a newly-filed and unrelated case as an excuse to evade the law in *this* case.

105. The Secretary finally contends that her right to disregard decisions of the Fourth Circuit Court of Appeals has recently been confirmed by the Supreme Court in its opinion in *United States v. Mendoza,* 52 U.S.L.W. 4019 (January 10, 1984). In *Mendoza,* a unanimous Supreme Court held that the government cannot be collaterally estopped from *relitigating* a constitutional issue adjudicated against it at the district court level in a different lawsuit brought by a different party.

106. In *Mendoza,* a United States district court in California *refused to hear the merits* of a defense raised by the government to a due process claim arising out of the Nationality Act of 1940. The court's reason for refusing to hear the merits of the government's defense was a prior decision unfavorable to the government rendered in a similar case by a different California United States district court. The Supreme Court held that nonmutual collateral estoppel may not lie against the government in such a case.

107. *Mendoza* is not in point. The pertinent holding of *Mendoza* was only that the government must be allowed to challenge a law in court on its merits, *not* that an officer of the government may disobey court decisions with which he or she disagrees. This court has not refused to hear the merits of anything defendant wanted to present; on the contrary it has proceeded to the merits without unnecessary delay, and has heard everything defendants had to offer. The plaintiffs have claimed that the Secretary does not follow the law of the Fourth Circuit, and have cited authority, squarely in point, to support this claim. The Secretary has asserted that she *does* follow the law of the Circuit or, that where she does

not follow it, she is not required to. The Court has considered the Secretary's case, has searched for its merits, and finds none.

108. Plaintiffs say (brief in support of injunctive relief, pp. 8-10) that their rights to "procedural due process" have been denied. Defendant responded in a footnote. Procedural due process does appear to be a valid additional basis of decision. *See Mathews v. Eldridge*, 424 U.S. 319, 322 (1976) (interest in continued receipt of disability benefits is a property interest protected by the Fifth Amendment); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (conclusion of agency as to eligibility for welfare benefits must rest upon legal rules and evidence presented at a hearing). I have always been puzzled as to how much one clarifies the concept of due *process* of law ("that process which is due") by calling that *process* "procedural." Moreover, the quest for procedural due process in this context leads inevitably for its identification back to the cases of *Myers, Martin* and *Dotson*. Therefore, although "procedural due process" is an additional valid basis for this decision, I will not add more to what has already been written.

DECISION

Plaintiffs have established a clear entitlement to have their claims for disability benefits reviewed pursuant to procedures that comport with the controlling decisions of this circuit interpreting the Social Security Act. The court will order relief consistent with this decision.

This 14 day of February, 1984.

/s/ JAMES B. MCMILLAN

JAMES B. MCMILLAN
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-83-655-M

Patrick H. Hyatt; Herman O. Caudle and Mary P. Lovingood, on behalf of themselves and all others similarly situated,

Plaintiffs,

and

North Carolina Department of Human Resources, Disability Determination Services,

Plaintiff-Intervenor,

-vs-

Margaret M. Heckler, or her successors in office, Secretary of the United States Department of Health and Human Services,

Defendant.

JUDGMENT

Pursuant to the findings of fact and conclusions of law previously entered, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Defendant's motion to dismiss the action for lack of jurisdiction is DENIED.

2. Plaintiffs' motion for certification of a class is ALLOWED. The procedure for defining and notifying the

class and instituting class action proceedings is being set out in a separate order.

IT IS HEREBY FURTHER ORDERED that the Secretary of Health and Human Services is restrained and enjoined:

1. To cease immediately her policy of refusing to follow the law of the Fourth Circuit in implementing the Social Security Act in North Carolina.

2. To begin immediately to follow the law of the Fourth Circuit within North Carolina as it is expressed in *Martin v. Secretary of Health, Education and Welfare*, 492 F. 2d 980 (4th Cir. 1974), *Myers v. Califano*, 611 F. 2d 905 (4th Cir. 1980), and *Dotson v. Schweiker*, 719 F. 2d 80 (4th Cir. 1983), and to issue written directives to SSA and DDS officials and other persons responsible for the administration of Social Security disability programs in North Carolina, ordering such persons to follow Fourth Circuit standards.

3. Within thirty (30) days from the date of entry of this judgment, to provide the North Carolina Department of Human Resources, Disability Determination Services, with sufficient information with regard to disability claims to enable DDS to identify the persons who may be entitled to relief under this judgment.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED:

1. The case of plaintiff Hyatt is remanded for reconsideration by the Secretary in light of the findings of fact and conclusions of law previously entered.

2. A class action order will be entered.

3. Defendant shall provide plaintiffs access to the claims files sufficient to enable them to verify compliance with this judgment.

4. The Secretary shall pay to the North Carolina Department of Human Resources, Disability Determination Services, any costs incurred by DDS in implementing the terms of this judgment.

5. Defendant shall pay to plaintiffs' counsel their costs and reasonable attorneys' fees and expenses incurred in this case.

This 14 day of February, 1984.

/s/ JAMES B. MCMILLAN

James B. McMillan
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Charlotte Division

C-C-83-655-M

PATRICK H. HYATT; HERMAN O. CAUDLE and MARY P. LOVINGOOD, on behalf of themselves and all others similarly situated,

Plaintiffs,

and

NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DISABILITY DETERMINATION SERVICES,

Plaintiff-Intervenor,

-vs-

MARGARET M. HECKLER, or her successors in office, Secretary of the United States Department of Health and Human Services,

Defendant.

ORDER CERTIFYING A CLASS AND REQUIRING NOTICE

Pursuant to the findings of fact, conclusions of law and judgment previously entered, and after consideration of further argument and briefs, the class is defined as follows:

A. The *Martin* and *Myers* subclass —

(1) All North Carolina residents who, since September 10, 1981, have applied for disability benefits (SSI or SSDI benefits) under the Social Security Act and whose claims were denied, either in an initial determination or another level of the administrative appeal procedure, because:

(a) the Secretary or DDS relied upon an absence or lack of end-organ damage, current or past, as determining that the claimant's hypertension or diabetes mellitus was not a severe impairment; or

(b) the Secretary or DDS relied upon an absence or lack of clinical findings as determining that the claimant's pain was not disabling; and

(2) All North Carolina residents whose benefits under the statute have, since September 10, 1981, been terminated or are subject to being terminated by the Secretary or DDS on grounds that they were not disabled under the Act for one or both of the reasons noted above in (a) and (b); and

B. The *Dotson* subclass —

All North Carolina residents whose Social Security disability benefits have, since October 6, 1982, been terminated or are subject to being terminated on grounds that the recipients were not disabled under the Act, without findings, and substantial evidence to support those findings, that, since the Secretary's most recent determination of disability as defined in the Act, there has been improvement in their medical condition sufficient that they are no longer disabled.

The court finds that the class meets the requirements for certification of a class action under Federal Rule of Civil Procedure 23(a) and 23(b)(2):

1. The class is so numerous (many thousands of claimants whose benefits have been terminated or whose applications have been denied) that joinder of all members is impracticable.

2. The claims of the members of the class as defined above present substantial common questions of law and fact. The claims have one significant and all-important feature of

commonality, in that it is the *procedures* under which the determinations are made (*i.e.*, in disregard of controlling court decisions) which all potential claimants are entitled to attack.

3. The claims of class representatives Hyatt, Caudle and Lovingood are typical of the claims of the class members.

4. The court finds that the named class representatives will fairly and adequately represent and protect the interests of the class.

5. The defendant has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

6. The exhaustion requirements of 42 U.S.C. §405(g) are met; the class includes only those persons who have presented or will have presented, in appropriate fashion, within the appropriate time limits, claims for benefits which come within the claims specified in the class designations.

7. The date of September 10, 1981 in paragraphs A.(1) and (2) is chosen because that is the date on which class representative Hyatt was notified that his disability had ceased, and on which he first became eligible to file a claim for reconsideration. Class members should be entitled to participate in this action as if they had filed claims on or since the date Hyatt became eligible to file a claim.

8. The date of October 6, 1982, is chosen for the beginning date of the group described in paragraph B. because that date is one year before the decision of the Fourth Circuit Court of Appeals in *Dotson v. Schweiker*, 719 F.2d 80 (4th Cir. 1983). *See* 20 C.F.R. §404.988 and §416.1488 (Secretary may reopen disability cases up to one year following final determination).

Defendant objects to the use of October 6, 1982, as the beginning date, arguing that the principle stated in *Dotson* is, even now, not the law in this Circuit. Instead, in a stated "spirit of cooperation with plaintiff's counsel," defendant proposes January 11, 1984, as the beginning date.

That proposal does not sound like cooperation.

As already stated by this court in its conclusions of law, numbers 97 and 100, the Secretary was already bound to apply the "medical improvement" standard before *Dotson* was decided.

Since *Dotson* did not invent, nor claim to invent, any new rule of law, defendant's claim that it should not apply to pre-*Dotson* claims has no merit.

Hyatt v. Heckler, C-C-83-655, slip op. at 37 (W.D.N.C. Feb. 14, 1984). *See also Dotson v. Schweiker*, 719 F.2d 80, 82 (4th Cir. 1983) (The *Dotson* court relied in part on section 4(c) of the Administrative Procedure Act, 5 U.S.C. §556(d), an established rule of law that the proponent of a position has the burden of proof.) In addition, October 1982 is an appropriate beginning date because that is when the Secretary issued SSR 82-49c, her ruling of "non-acquiescence" with respect to *Patti v. Schweiker*, 669 F.2d 582 (9th Cir. 1982), which also applied a medical improvement standard.

9. The Secretary is further ORDERED to direct her agents at the North Carolina Disability Determination Services to mail, within sixty (60) days of the entry of this order, the Notice attached as Appendix A to the last known address of each North Carolina resident whose disability benefits were stopped on or after October 6, 1982. Along with the notice shall be mailed the postage-prepaid reply form attached as Appendix B and addressed to the North Carolina Disability Determination Services.

The Secretary has complained that sixty days are not enough time in which to mail notices to these class members,

arguing that her resources are limited because she "is currently attempting to comply with a number of injunctive orders in major class action lawsuits nationwide." Defendant further suggests that any deadline imposed by the court will adversely affect current beneficiaries or claimants who are not members of this class. Defendant's burdens are caused by her own apparent violations of the law. Sixty days should be ample time for her to comply.

10. The Secretary is further ORDERED to review the files of all North Carolina applicants for disability benefits since September 10, 1981, and all North Carolina residents whose benefits were stopped since September 10, 1981, exclusive of persons identified pursuant to paragraph 9, *supra*, to determine if their claims involved allegations of hypertension or diabetes or pain, or any condition with which pain is commonly associated, including, but not limited to, chronic back pain. To the last known address of each person so identified, the Secretary shall within one hundred and twenty (120) days of the entry of this order, send the Notice attached as Appendix C and the postage-prepaid reply form attached as Appendix D and addressed to the North Carolina Disability Determination Services.

11. Since all cases relevant to this action which are pending before administrative law judges or the Appeals Council have been processed under an erroneous view of the law which the Secretary has refused to change, potential class members who respond to either Notice will be given the option of having the North Carolina Disability Determination Services reassess their case at the initial level, or at whatever appellate level their case has reached. If the claimant has already had a hearing, an opportunity for a supplementary hearing shall be afforded. Counsel for all parties are directed to submit to the court within thirty (30) days of the entry of this order, proposed contents of the follow-up notices informing claimants of their options.

12. In addition to providing individual notice to potential class members, the Secretary is FURTHER ORDERED to publicize this decision by means of: Public service announcements on radio stations and television stations throughout North Carolina; posters in all Social Security offices, Offices of Hearings and Appeals, and Departments of Social Services; and press releases to newspapers throughout North Carolina.

13. SSA and DDS shall keep records of the names and pertinent information regarding the persons who respond to the notices required by paragraphs 10 and 12, *supra*. Each agency shall forward such information to the other agency. Lists of the names and pertinent information shall be supplied by each agency to plaintiffs' counsel, Legal Services, on the first of each month following the entry of this order.

14. Persons who respond to either of the individual notices or to the public notices, but who are then determined by Disability Determination Services or the Secretary not to be members of the class, shall be given an immediate opportunity to appeal that determination. If the number of appeals is large, or the determinations are not promptly made, the court will consider appointing a Special Master.

15. Copies of all directives which the Secretary has already sent to her agents concerning implementation of this order, or the court's February 14, 1984 order, shall be sent immediately to plaintiffs' counsel. Copies of future such directives shall be sent as and when they are issued.

16. All relief ordered in the judgment entered February 14, 1984 shall be afforded to the class members defined herein.

This 26 day of March 1984.

/s/ JAMES B. MCMILLAN

James B. McMillan
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Charlotte Division

C-C-83-655-M

PATRICK H. HYATT; HERMAN O. CAUDLE and MARY P. LOVINGOOD, on behalf of themselves and all others similarly situated,

Plaintiffs,

and

NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DISABILITY DETERMINATION SERVICES,

Plaintiff-Intervenor,

-vs-

MARGARET M. HECKLER, or her successors in office, Secretary of the United States Department of Health and Human Services,

Defendant.

AMENDED ORDER ALLOWING ATTORNEYS' FEES

Following is the April 6, 1984 order allowing attorneys' fees, as amended. Additions to the text are enclosed in brackets, and deletions from the text are marked through with dashes.

I

Plaintiffs brought this class action suit against defendant in the fall of 1983, seeking injunctive relief for defendant's wilful violation of the law. The North Carolina Department of Human Resources, Disability Determination Services, later intervened. On February 14, 1984, this Court ordered the defendant to stop acting in violation of specified "controlling decisions of the United States Court of Appeals for the Fourth Circuit of the United States."

Plaintiffs and intervenor have now moved for an attorneys' fee award under the Equal Access to Justice Act (EAJA), 28 U.S.C. §2412.

II

[The EAJA, 28 U.S.C. §2412(b), confers discretion on a court to find the United States liable for "fees and expenses to the same extent that any other party would be liable under the common law . . . ."] The EAJA [further] provides that, unless otherwise provided by statute, a prevailing party in a case brought by or against the United States is entitled to fees, expenses and costs unless the United States establishes that its position in the litigation was "substantially justified or that special circumstances make an award unjust." 28 U.S.C. §2412(d)(1)(A).

[Intervenor is entitled to fees and expenses under 28 U.S.C. §2412(b). The United States has acted in bad faith, vexatiously and wantonly in this action (*see* discussion page 3, *infra*), and those actions justify an award of fees. *See, e.g., Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 240, 258-259 (1975).]

Plaintiffs are clearly prevailing parties in this litigation. Just as clearly, the EAJA may apply to actions of the Secretary for Health and Human Services. *See Guthrie v. Schweiker,* 718 F.2d 104 (4th Cir. 1983). Therefore, the court must determine whether the government's position was "substantially justified." The burden is on the Secretary to show that her action met that standard. *See, e.g., Phillips v. Heckler,* 574 F. Supp. 870 (D.C.N.C. 1983); *Ulrich v. Schweiker,* 548 F. Supp. 63 (D. Idaho 1982). The "substantially justified" standard is essentially one of reasonableness, *Tyler v. Business Services, Inc. v. NLRB,* 695 F. 2d 73 (4th Cir. 1982), although "it can be concluded that the applicable standard which this court must apply is slightly above one based on reasonableness." *Wolverton v. Schweiker,* 533 F. Supp. 420, 424 (D. Idaho 1982). If the court finds that the

Secretary's position was not "substantially justified," then the court must determine whether "special circumstances" would make an award of fees unjust. Finally, the court must determine what amount of fees, if any, should be awarded.

III

The government's position in this case is neither "substantially justified" nor "reasonable." To the contrary, the Secretary's position is not even marginally justifiable, and it fairly may be characterized as outrageous, at best, both before this case was filed and during the course of this suit. The court found on February 14, 1984, as a matter of fact and of law, that the Secretary has consciously and wilfully disregarded the law. The court now reaffirms that conclusion. The government's defense in this court, on both jurisdictional and substantive grounds, of the Secretary's actions is equally unjustifiable. As this court held in its February 14, 1984 decision, the Secretary's jurisdictional defense is wholly without merit, and it has no substantive defense for its unlawful actions and practices. The court therefore concludes that the Secretary's position in this court is not substantially justified.

There are no "special circumstances" to make a fee award unjust.

[Plaintiffs, therefore, as well as intervenor, are entitled to fees and costs under the EAJA. Based on the bad faith shown by the United States in this case, plaintiffs are entitled to recover under either §2412(b) or §2412(d). Since plaintiffs' petition is based on §2412(d), however, the court will calculate fees on that basis.]

Counsel have submitted affidavits with their petitions for fees which cover the time, effort and costs incurred in pursuing the case before this court.

The court has analyzed the petitions in light of *Blum v. Stenson*, ____ U.S. ____, 52 U.S.L.W. 4377 (March 20,

1984), *Hensley v. Eckerhart,* ____ U.S. ____, 52 U.S.L.W. 4552 (May 16, 1983), and of the factors discussed in *Johnson v. Georgia Highway Express,* 488 F. 2d 714 (5th Cir. 1974), *Barber v. Kimbrell's, Inc.,* 577 F. 2d 216 (4th Cir. 1978), and *Anderson v. Morris,* 658 F. 2d 246 (4th Cir. 1981). Based on that analysis, the court will determine the fee to be awarded by making an initial estimate of a reasonable attorneys' fee, and then by making an adjustment in that estimate, if appropriate.

A. *Initial estimate of the various reasonable attorneys' fees.*

> "The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate."

Blum v. Stenson, ____ U.S. at ____, 52 U.S.L.W. at 4377. The "reasonable hourly rate" is to be determined by considering an appropriate market rate for comparable legal services in the community. A court should consider a number of factors, including special skill and expertise and quality of representation when finding a reasonable hourly rate. *Id.* at 4380. This court will also consider the factors set forth in *Johnson v. Georgia Highway Express, supra,* which were cited with approval by the Fourth Circuit in *Barber v. Kimbrell's, Inc., supra,* and *Anderson v. Morris, supra,* in ascertaining the reasonable hourly rate applicable to the services rendered in this case. The burden is on the fee applicant to produce satisfactory evidence, including affidavits, that the requested rates are consistent with prevailing rates in the community for similar legal services. *Blum v. Stenson,* ____ U.S. at ____, 52 U.S.L.W. at 4379, fn. 11. Although the fee applicants in this case submitted motions, affidavits and supporting memoranda before the *Blum* decision was announced, and therefore based their applications on the procedure required by *Georgia Highway Express* and *Anderson v. Morris,* the information supplied is sufficient to inform and assist this court in the exercise of its discretion.

At the outset, the court [again] notes that the statutory basis for an attorneys' fee award in this case is 28 U.S.C. §2412, also known as the Equal Access to Justice Act (EAJA). [28 U.S.C. §2412(d)(2)(B), which applies to plaintiffs, states that:]

> [A]ttorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

The court takes judicial notice of *Impro Products, Inc. v. Block,* 569 F. Supp. 1389 (D.D.C. 1983) which considered the maximum rate allowable under the EAJA to be $83 per hour, based on an increase in the cost of living during 1981-82. The court in that case based its determination, at least in part, on *Price Index — All Urban Consumer,* U.S. Department of Labor, Bureau of Labor Statistics, Washington, D.C., April 22, 1983. Although personal experience makes this judge certain that the cost of living has risen further since publication of the *Price Index,* the court will not, without further evidence of that fact, increase the $83 per hour rate. Therefore, this court concludes that the maximum rate to be awarded [to plaintiffs] under the EAJA in this case, absent additional "special factors," is $83 per hour. [An award to intervenor is not restricted by the limitations stated in §2412(d)(2)(B). The court, however, in its discretion, will calculate intervenor's fee award based on the same considerations used to determine plaintiffs' fee award.]

Francis Pinckney, long an able attorney in this area and currently the president of the Mecklenburg County Bar Association, has submitted an affidavit which sets forth what he considers to be the prevailing fees in this legal community. Pinckney states that a reasonable fee range for an attorney with three or more years experience in federal litigation is $85 to $125 per hour. He further states that $60 per hour is a reasonable fee for a first-year associate with a year

of experience clerking for a United States Court of Appeals Judge. Finally, he states that $25 to $35 per hour is a reasonable fee range for summer law clerks and for paralegals specializing in litigation.

Six of the attorneys to whom fees are due (Bishop, Bryan, Fillette, Harper, Hayes and Wester) have more than three years of experience in federal litigation. Absent the limitations of the EAJA, therefore, each would be due a fee computed at more than $85 per hour.

A number of other factors support the application of an hourly rate at or near the higher end of the fee ranges articulated by Pinckney.

1. *The special skill and experience of counsel.* — Each of the six attorneys named above displayed great skill in this case. Although the length of experience of this group varies from four years to fourteen, those lawyers with the least amount of time practicing "the trade," attorneys Hayes and Harper, have developed substantial expertise in the field which was the subject matter of this lawsuit. Attorney Spence, although not as experienced as the other attorneys, also displayed commendable skill in his work in drafting documents presented to the court.

2. *The quality of representation.* — Counsel did an excellent job of representing the plaintiffs and the intervenor.

3. *The results obtained in this suit.* — Plaintiffs and the intervenor achieved substantially everything they sought in pursuing this litigation. The order of this court will affect favorably thousands of disabled people in a significant way. Furthermore, the prospective effect of this court's order will serve to prevent untold hardship from afflicting countless other disabled people.

4. *The novelty and difficulty of the questions raised, and the skill performed in rendering legal services.* — Although the legal questions were clear, the defendant was intransigent

throughout the course of the case. Counsel for plaintiffs and intervenor displayed great skill in presenting their positions and in refuting the contentions of defendant.

5. *Loss of other income on account of this case.* — A number of the attorneys and staff who worked on this case have never expected to be compensated. Those people, members of the law firm of Fleming, Robinson, Bradshaw & Hinson, P.A., offered their services to plaintiffs as part of the Volunteer Lawyers Program (VLP) of the Mecklenburg County Bar and of Legal Services of Southern Piedmont, Inc. The Volunteer Lawyers Program, from its inception, has had a policy that participating *pro bono* attorneys should seek the award of fees where appropriate in VLP cases, but that any fees awarded by a court should accrue directly to the VLP for utilization by the Program for further provision of free legal services to eligible residents of Mecklenburg County. The court concludes, therefore, that this factor should have no effect on the award.

6. *Time limitations imposed by the client or the circumstances.* — The circumstances of this case put a premium on fast action by counsel in seeking a court order stopping the defendant from failing to follow the law. The amount of benefits awarded or not awarded to each individual plaintiff may be small in the abstract, but the effects of withholding those payments from the plaintiffs are immediate and substantial. To the extent that this court's order prevents any future denial or cessation of deserved benefits, quick action by counsel afforded the plaintiffs greater relief than plaintiffs might otherwise have obtained.

7. *Reputation and ability of counsel.* — These characteristics of counsel were, and continue to be, excellent.

8. *The undesirability of the case within the legal community.* — This factor should have no effect on the award.

9. *Nature and length of the professional relationship.* — This factor does not affect the award.

All of the above factors would support a determination that the applicable hourly rate for attorneys Bryan and Wester should be at or near $125 per hour. The EAJA limits the rate, *prima facie,* however, to $83 per hour.

Attorney Spence's hourly rate is hereby determined to be $60 per hour. The rate for Bryan and Wester is hereby determined to be $83 per hour.

Attorneys Bishop, Fillette, Harper and Hayes, like Bryan and Wester, nothing else appearing, would also be entitled to charge $125 per hour. In addition, they are particularly experienced in litigation under the Social Security Act, and lawyers with their level of such expertise are not readily available. This "special factor," which is recognized in 28 U.S.C. §2412(d)(2)(A), justifies a higher hourly rate than otherwise allowed under the EAJA. *See Hoopa Valley Tribe v. Watt,* 569 F. Supp. 943 (N.D. Cal. 1983). The court therefore determines that Fillette and Hayes should be compensated at a rate of $95 per hour, and that Bishop and Harper should be compensated at the rate of $90 per hour.

The services of paralegal Vorhoff and law students Foster, Cassada, and Loeb should be compensated at the rate of $25 per hour.

10. *The time and labor expended.* — The affidavits submitted demonstrate that the following hours were spent on this case:

Attorneys	Hours
Bishop	117.40
Bryan	221.80
Fillette	25.00
Harper	258.00
Hayes	64.25
Spence	310.00
Wester	148.90
Law Students	
Cassada	107.30
Foster	63.50
Loeb	128.70
Paralegal	
Vorhoff	45.30

Based on all of the above factors, the court's initial estimate of a reasonable attorneys' fee for plaintiffs, which includes an award for law clerks and paralegal, is $89,728.85. The court's initial estimate of a reasonable attorney's fee for intervenor is $10,566.00.

B. *The suitability of an upward adjustment in the fee award.*

This case is a prime example of a situation in which a substantially enhanced award is justified. Although the "results obtained" in a suit

> *normally* should not provide an independent basis for increasing the fee award
>
> * * *
>
> in some cases of exceptional success an enhancement award may be justified.

Blum at 4381 (emphasis added). *See also Hensley v. Eckerhart,* __ U.S. __, 51 U.S.L.W. 4552 (May 16, 1983).

The contingent nature of the fee award also justifies an upward adjustment of the fee award, at least as to the plaintiffs' attorneys. *Cf. Blum v. Stenson,* 52 U.S.L.W. at 4381. *See also* 52 U.S.L.W. at 4381 (Brennan and Marshall, JJ., concurring). The plaintiffs' attorneys served their clients without hope of any payment unless they prevailed in the lawsuit. The unusual circumstances of this case make the contingent fee arrangement especially significant.

Despite the fact that this case is one in which an enhanced award is particularly appropriate, the limitations of the EAJA prevent such an upward adjustment of the fee. None of the parties have submitted any authority in support of the assertion that a court may enhance the award to the extent that the hourly rate limitations would be exceeded.

Taking all of the above factors into consideration, the court is of the opinion that a fee of $89,728.85 for plaintiffs' counsel, and a fee of $10,566.00 for intervenor's counsel, are reasonable, and should be paid.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the reasonable value of the services rendered by plaintiffs' counsel which are properly taxable under the Equal Access to Justice Act is $89,728.85.

2. That the sum of $89,728.85 shall be paid to Legal Services of Southern Piedmont, Inc. by the United States as counsel's full and only fee for representing plaintiffs in this civil action to this date.

3. That defendant shall also pay to Legal Services of Southern Piedmont, Inc. the plaintiffs' expenses and costs of $2,056.26.

4. That the reasonable value of the services rendered by intervenor's counsel which are properly taxable under the Equal Access to Justice Act is $10,566.00.

5. That the sum of $10,566.00 shall be paid to Attorney Jeffrey Bishop as his full and only fee for representing intervenor in this civil action to this date.

6. That defendant shall also pay to intervenor's attorney the intervenor's expenses and costs of $315.49.

This 8 day of May, 1984.

/s/ JAMES B. MCMILLAN

JAMES B. MCMILLAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION

PATRICK H. HYATT, ET AL.

Plaintiff,

v. Civil No. C-C-83-0655-M

MARGARET M. HECKLER,
SECRETARY OF HEALTH
AND HUMAN SERVICES,

Defendants.

AFFIDAVIT OF JEAN HALL HINCKLEY

State of Maryland :

ss

County of Baltimore:

I, Jean Hall Hinckley, being duly sworn according to law, depose and say as follows:

1. I am the Acting Deputy Associate Commissioner for Disability, Office of Disability, Social Security Administration, Baltimore, Maryland.

2. The Office of Disability is responsible for developing policy and administering the provisions of the Social Security Act relating to disability, particularly with reference to initial and reconsideration determinations of disability and decisions to cease entitlement to benefits.

3. The Social Security Administration administers the disability programs through the Office of Disability in cooperation with the Disability Determination Services (DDS) of the State of North Carolina, Department of Human Resources.

4. The relationship between a State Agency Disability Determination Services and the Social Security Administration is provided for in section 221 of the Act, 42 U.S.C. 421, as amended by P. L. 96-265, effective June 1, 1981, and its corresponding regulations, 46 Fed. Reg. 29191 (May 29, 1981):

> . . . The Secretary is required to establish by regulation, whatever standards of performance and administrative requirements and procedures he considers necessary for the States to follow to insure effective and uniform administration of the SSA disability programs. Section 221(a) amended by Pub. Law 96-265, provides that beginning June 1981, disability determinations will be made by the State unless it notifies the Secretary, in writing, of its wishes to no longer make the determinations, and if the Secretary has not found that the State has failed to make determinations consistent with standards to be prescribed by the Secretary. Section 221(c) authorizes the Secretary to review State determinations and, based on the review, to make findings as to whether the disability began on an earlier or later date than that determined by the State. See also 20 C.F.R. 404.1601, *et seq.* and 416.1001, *et seq.*

5. The duties and responsibilities of the North Carolina DDS involve administration of a Federal program governed by Federal law and all costs to the State of North Carolina in carrying out the disability determination function are paid for with Federal funds.

6. I have reviewed the judgment and draft order certifying a class in the above-captioned case, which was entered on February 14, 1984, with particular reference to the identification of all class members and the implementation of the relief.

7. The identification of the class members in this case and the implementation of the proposed relief would be extremely costly and burdensome to the Social Security Administration for the following reasons:

7A. In the period from September 1981 to the present, for individuals residing in the State of North Carolina, the Social Security Administration denied approximately 60,496 applicants for Title II and Title XVI disability benefits. In the same period, the Social Security Administration found 12,453 Title II and Title XVI disability recipients were no longer disabled.

7B. The estimated percentage of those Title II and Title XVI disability claims which were denied or ceased based on a non-severe impairment of hypertension or diabetes mellitus without end-organ damage is 6.4%.

7C. The estimated percentage of those Title II and Title XVI disability cases which were denied or ceased and could involve an allegation of significant pain which was unsupported by clinical evidence is 25%.

7D. A review of the entire universe of Title II and XVI disability denials and disability cessations (72,949) in the State of North Carolina from September 1981 to the present would have to be undertaken to identify the designated class in this case and it is expected that approximately 21,433 cases would be identified as class members from this universe of cases.[1]

---

[1]This review of all disability denials and disability cessations from September 1981 to the present is required because State and Federal systems do not have the capacity to identify cases by body system impairment, thereby rendering it impossible to tell if a case alleges hypertension or diabetes mellitus without end-organ damage or pain without a manual review of each claim folder from the overinclusive universe of denials and cessations.

7E. The screening of 72,949 cases to locate the approximately 5,140 cessations from October 1982 to the present and to determine which claims involve class members in the other categories would require approximately 24,316 hours of work at a total approximate cost of $323,400.00.[2]

7F. The process of screening the entire 72,949 claims to identify the class members in this case would involve collection of all claims folders which are not physically located in one place.

7G. The potential locations of these claims folders include the Office of Disability Operations, the six Program Service Centers, the Federal Records Centers, the Social Security District Offices, the Offices of Hearings and Appeals, the Office of the General Counsel, Department of Health and Human Services, and the State Disability Determination Agency in North Carolina.

7H. This screening process is expected to identify approximately 67,626 class member cases which will have to be further screened by professional disability examiners because of the difficulty in identifying cases involving pain. (Since pain is not an impairment, but a symptom, its alleged existence is not documented on our quick-access coding sheets.) This process, which will take 30 minutes a case, will cost $458,250.00. From this screening will emerge the approximately 21,433 cases of hypertension, diabetes and pain which must be reopened and readjudicated. In addition, all the disability cessations from October 1982 to the present (5,140) must be reopened and readjudicated.

---

[2]These work hours and costs are arrived at after assuming that the location and review of all cases which were denied or ceased since September 1981 to the present in the State of North Carolina to identify class members would take an average of 20 minutes per claims folder. This would result in 24,316 hours of work or 14 Federal work years (1,750 hours equals 1 Federal work year). The average cost of one Federal work year is $23,100.00, which when multiplied by the total number of estimated Federal work years equals $323,400.00

7I. The reopening and readjudication of class member cases would be undertaken by the Disability Determination Service of the State of North Carolina at an estimated total cost of $8,742,517.00.[3]

7J. The total cost for Disability Determination Services of the State of North Carolina screening of folders and reopening and adjudication is $9,200,767, which represents $458,250 for screening and $8,742,517 for reopening and readjudication.

7K. The total expected cost for implementation of this court order to the Social Security Administration is $9,524,167.00.[4]

8. The process of identification, collection, and review of the case files of each class member in the above-captioned case would involve an inordinately burdensome expenditure of fiscal and human resources which the agency otherwise depends upon in the normal administration of the disability programs under Titles II and XVI of the Act.

---

[3]The average cost of processing a case in the State of North Carolina in fiscal year 1984 is estimated to be $142.00 per case, plus medical costs. If a consultative examination (i.e., medical cost) is necessitated in each of these cases the total medical costs for these cases would be $4,969,151.00 (the average cost for a consultative mental exam is $187 per exam, thus $187 × 26,575 = $4,969,151.00). The total estimated cost for the Disability Determination Service to reopen and readjudicate class member cases could be $8,742,517.00 ($142.00 × 26,573 + $187.00 × 26,573 = $8,742,517.00).

---

[4]Summary

Total potential universe	72,949
Assumed class members	26,573
Federal work-years	14
Federal cost	$ 323,400
DDS work-years	123
DDS cost	$9,200,767
SSA cost	$9,524,167

9. The information contained in this affidavit was secured by various employees of the Social Security Administration and is true and correct to the best of my information and belief.

/s/ JEAN HALL HINCKLEY

JEAN HALL HINCKLEY
Acting Deputy Associate
Commissioner for Disability
Office of Disability
Social Security Administration

Sworn and Subscribed before me
this 12th day of March, 1984.

/s/

NOTARY PUBLIC

My Commission expires: 7-1-86.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA CHARLOTTE DIVISION

Civil Action No. C-C-83-655-M

PATRICK H. HYATT, HERMAN O. CAUDLE and MARY P. LOVINGOOD, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

and

NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DISABILITY DETERMINATION SERVICES,

Plaintiff-Intervenor,

v.

MARGARET M. HECKLER, or her successors in office, Secretary of the United States Department of Health and Human Services,

Defendant-Appellant.

ORDER

This matter comes before the Court upon the order of remand issued by the United States Court of Appeals for the Fourth Circuit, *Hyatt v. Heckler*, 757 F.2d 1455 (1985), petitions for rehearing denied. The March 27 order of this Court, and the Fourth Circuit's instructions focus on the following class of plaintiffs:

A. The *Martin* and *Myers* subclass

(1) All North Carolina residents who, since September 10, 1981, have applied for disability benefits (SSI or SSDI benefits) under the Social Security Act and whose claims were denied, either in an initial determination or another level of the administrative appeal procedure, because:

(a) the Secretary or DDS relied upon an absence or lack of end-organ damage, current or past, as determining that the claimant's hypertension or diabetes mellitus was not a severe impairment; or

(b) the Secretary or DDS relied upon an absence or lack of clinical findings as determining that the claimant's pain was not disabling; and

(2) All North Carolina residents whose benefits under the statute have since September 10, 1981, been terminated or are subject to being terminated by the Secretary or DDS on grounds that they were not disabled under the Act for one or both of the reasons noted above in (a) and (b); and

B. The *Dotson* subclass

All North Carolina residents whose Social Security disability benefits have, since October 6, 1982, been terminated or are subject to being terminated on grounds that the recipients were not disabled under the Act, without findings, and substantial evidence to support those findings, that, since the Secretary's most recent determination of disability as defined in the Act, there has been improvement in their medical condition sufficient that they are no longer disabled.

In compliance with the Fourth Circuit's opinion and order,

IT IS HEREBY ORDERED:

1. *General.* The Court vacates the injunctive and declaratory relief it has heretofore ordered. The Secretary shall reconsider the claims of terminee class members (subclasses A(2) & B) pursuant to the Social Security Disability Reform Act of 1984. The claims of initial-applicant class members who have not met the requirements of Section 405(g) are dismissed. The Secretary shall reconsider the remaining claims of persons determined to be in subclasses A(1)(b) (the *Myers* initial applicants) pursuant to the interim pain standard of Section 3(a) of the 1984 Act. She shall reconsider the claims of persons determined to be in subclass (A)(1)(a) (the *Martin* initial applicants), reevaluating her policy of nonacquiescence in light of the 1984 Act's legislative history and circuit precedent. The complaint in intervention of the North Carolina Department of Human Resources, Disability Determination Services is dismissed. The Court will consider the matter of attorneys fees by way of separate order.

2. *Jurisdiction.* This Court will retain jurisdiction in this case solely for the purpose of assuring that individual class members are properly recognized for purposes of obtaining relief pursuant to this order. The Court will relinquish jurisdiction to monitor or review the Secretary's actions in administering new hearings or decisions that occur during the reconsideration of individual claims following remand. Relinquishing such jurisdiction is done without prejudice to class members' rights to seek timely review of the final decisions of the Secretary on remand in their respective judicial districts in separate actions pursuant to §405(g).

3. *Review of Class Identification Procedures.* Within the next 15 days, the Secretary shall: (1) turn over to plaintiffs' counsel a list of the names and addresses of all potential *Dotson* subclass members heretofore notified of possible class eligibility; and (2) permit plaintiffs' counsel to examine in Charlotte relevant documents concerning the Secretary's

computer programs, checklists and other aspects of her effort to identify *Dotson* subclass members. Similarly, within thirty days, the Secretary shall develop her plan for identifying *Martin* and *Myers* subclass members and make available in Charlotte to plaintiffs' counsel all relevant information about that plan (including the list of persons deemed entitled to receive the initial notice), as well as relevant documents. If, after reviewing any portion of the documents made available by the Secretary, plaintiffs' counsel deem it necessary to discuss the Secretary's procedures with persons knowledgeable about them, the Secretary shall promptly make such persons available in Charlotte for discussions with plaintiffs' counsel. If, after reviewing these identification programs, plaintiffs' counsel have any substantial dispute with the Secretary about the procedures she has used or proposes to use, they shall inform the Court, and the Court will resolve such dispute.

4. *Review of Individual Class Members' Cases.* The Court hereby remands to the Secretary and relinquishes jurisdiction over the claims of all individuals whom the Secretary already has determined to be in the class. As to other persons who have indicated interest, or in the future indicate interest, in participating in class relief, the Secretary shall within 30 days of receiving such indication (absent extraordinary circumstances) decide whether the person is a class member. If the Secretary finds that the person is a class member, his or her case thereupon shall be automatically and immediately remanded for a new hearing, and this Court will relinquish jurisdiction over it. If the Secretary decides that the person is not a class member, then (1) within 20 days thereafter, the Secretary shall so notify plaintiffs' counsel and make available the person's file to plaintiffs' counsel in Charlotte; (2) the Secretary and plaintiffs' counsel shall confer if plaintiffs' counsel disagrees with the Secretary's decision; and (3) the parties will submit the dispute to this Court for resolution if they cannot resolve it themselves.

5. *Resolution of Existing Questions Concerning Class Membership.* The following directives are made to clarify who is and who is not in the class entitled to relief under this Court's initial certification order as modified by the Court of Appeals:

(a) The group of terminee class members comprises all persons as to whom the Secretary has — from September 10, 1981 to present, at any level of review — made or upheld a decision that benefits should be terminated on the ground that the person is no longer disabled. Pursuant to the agreement of the parties no terminee shall be excluded on the ground that his or her case does not involve pain, hypertension or diabetes.

(b) The group of initial applicant class members comprises all persons who — from August 1, 1983 to present — were sent an Appeals Council decision affirming a denial of benefits. As set forth in the March 27 order, any such person is entitled to relief "if their claim involved allegations of hypertension or diabetes or pain, or any condition with which pain is commonly associated, including, but not limited to chronic back pain."

(c) Rejected applicants who were sent Appeals Council decisions before August 1, 1983, who seek class relief should get such relief if:

(i) They did not actually receive notice of the adverse Appeals Council decision until after August 5, 1983;

(ii) There was good cause, within the meaning of 20 CFR §404.911, for the failure to file a timely lawsuit, *e.g.,* 20 CFR §404.982; or

(iii) The Secretary has explicitly or implicitly granted a waiver or extension of the sixty day period of §405(g).

The Secretary, however, need not take this group of persons into account in formulating her computer program designed to generate the overinclusive pool of class members to whom initial notices are sent.

(d) No terminee shall be excluded from class relief because he or she brought an individual action and lost. Any initial applicant who brought an individual action and lost shall not receive relief, provided that the case has been finally disposed of (including by the running of all appeal periods) as of the date of this order. Class members who now have individual cases that have not been finally disposed of shall have the right to choose between obtaining a new review as a class member or proceeding with their own individual action. The Secretary shall promptly review all individual Social Security cases pending in North Carolina, and in each such case shall file and serve either Attachment A1 or Attachment A2, as appropriate.

(e) No person should be excluded from relief solely because the file shows that he or she has performed some work unless the record conclusively shows that the person has actually engaged in substantial gainful activity within the meaning of 20 C.F.R. §§404.1571-1576. If there is any possibility that a decisionmaker considered medical condition as well as work activity in making the adverse determination, and the person otherwise qualifies for class membership, the person is in the class.

(f) The class includes every person who otherwise meets the class requirements and now lives in North Carolina or has lived in North Carolina *at any time* after the class inception date (*i.e.*, September 10, 1981, for both terminees and initial applicants). In formulating procedures for identifying the pool of persons entitled to an initial notice, the Secretary need not review individual files to determine every past residence of each person who

might be in the class. The Secretary, however, shall fully utilize centralized sources of information that might identify persons who have resided in this state during the time period identified above.

6. *Notice.* The Secretary shall send Attachment B as the initial notice to terminees. She shall send Attachment C as the initial notice to applicants. When the Secretary informs persons they have not been accepted for class membership, she shall send them Attachment D (for terminees) or E (for initial applicants) setting forth their right to review of the decision in this Court. The Court reaffirms its March 27 order that: "In addition to providing individual notice to potential class members, the Secretary is further ordered to publicize this decision by means of: public service announcements on radio stations and television stations throughout North Carolina; posters in all Social Security offices and offices of Hearings and Appeals, and Departments of Social Services; and press releases to newspapers throughout North Carolina." If plaintiffs' counsel is able to set up a "hot-line," all notices sent out after its establishment shall be modified to prominently notify the recipient of such "hot-line."

7. *Program Monitoring Information.* The Secretary should provide to plaintiffs' counsel within 30 days the names of all persons who thus far have responded to her notices. From now on, each time the Secretary receives back a written response from a person she notifies, she should photocopy the person's name and address and send it to plaintiffs' counsel. The Secretary must also continue her stated present practice of sending a copy of every rejection letter to plaintiffs' counsel, and should also begin similarly sending copies of "acceptance" letters or periodic tabulations of the names and addresses of persons who have been reinstated. The Court will be tolerant of minor, unintentional failures to provide such notices, but the Court expects copies of all of

the notices described in this paragraph to be sent promptly to plaintiffs' counsel.

8. *Instructions on Remand.* Section 2(d)(4) of the 1984 Act provides that the Secretary's decisions regarding claims in subclasses A(2) and B are reviewable "in conformity with the time limits, exhaustion requirements and other provisions of Section 205 of the Social Security Act and regulations issued by the Secretary in conformity with such section." The Secretary is, therefore, directed to afford the members of these subclasses opportunity to seek the four levels of administrative review (initial determination, reconsideration, ALJ hearing, and Appeals Council review) set forth in 20 CFR, Part 404, Subpart J.

The Fourth Circuit's decision directs this Court to remand the claims of persons within Subclass A(1)(b) to the Secretary "for reconsideration pursuant to the interim pain standard of Section 3(a) of the 1984 Act" and to remand the claims of persons within subclass A(1)(a) to the Secretary for "reconsideration of her policy of non-acquiescence in light of the 1984 Act's legislative history and circuit precedent." With respect to claims of persons within subclass A(1)(a), the Fourth Circuit specified that a purpose of the remand is the development of "an unequivocal administrative record."

The 1984 Act does not mandate any particular form of remand with respect to these class members. The following specific instructions are fairly within the scope of the general instructions to this Court by the Court of Appeals, and indeed are necessary to achieve the aims of the Fourth Circuit in formulating those instructions:

(a) The Secretary must give these claimants an opportunity for a new hearing before an administrative law judge ("ALJ"), and an opportunity to present additional evidence in support of their claims; and,

(b) The Secretary must direct her decisionmakers that, if any of the claims present allegations or evidence that the claimant's hypertension or diabetes mellitus limits his or her ability to work, the decisionmakers must expressly consider these impairments in their decisions, expressly stating the standards under which their disabling effect are being evaluated.

9. The Court emphasizes that certain provisions in this Order reflect compromises of the parties reached in the unique setting of this case, and that this Order in no way reflects a precedent of this Court or a statement of policy by either party relevant in any other context.

This 25 day of June, 1985.

/s/ JAMES B. MCMILLAN

Honorable James B. McMillan

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Civil No. C-C-83-655-M

PATRICK H. HYATT, ET AL.

Plaintiffs,

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

DEFENDANT'S OPPOSITION TO PLAINTIFFS' SECOND MOTION FOR ATTORNEY FEES

* * *

Turning to the initial applicants for benefits ("Part II" of the Fourth Circuit's opinion), the Court of Appeals first noted the merit in the Secretary's claim that the class as certified should have been tailored to meet the strict requirements of 42 U.S.C. 405(g). By recognizing the necessity of exhaustion of administrative remedies and the timely filing for judicial relief in district court under the Social Security Act's jurisdictional prerequisites, the panel drastically reduced the size and scope of the remaining *Hyatt* class.[5]

* * *

Dated: June 20, 1985.

---

[5]See, Affidavit of Jean Hinckley, executed March 12, 1984, at ¶17A (attached). There, Ms. Hinckley estimated that 60,496 applicants for benefits were in the originally certified A(1) subclass. Counsel is informed, however, that only approximately 4,000 such individuals remain in the class after the Fourth Circuit's order — or only about 7% of the number on behalf of whom plaintiffs originally moved for relief.

Supreme Court, U.S.
FILED
DEC 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-474

In the Supreme Court of the United States

OCTOBER TERM, 1985

PATRICK M. HYATT, ET AL., PETITIONERS

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether, in this class action under 42 U.S.C. 405(g) challenging certain standards utilized by the Secretary of Health and Human Services in determining a claimant's entitlement to Social Security disability benefits, the district court had jurisdiction over the claims of class members who had not exhausted their administrative remedies.

2. Whether, in light of the requirement in 42 U.S.C. 405(g) that a claimant seek judicial review within 60 days of the Secretary's final decision on his claim for benefits, the district court had jurisdiction over the claims of class members who received a final decision of the Secretary more than 60 days before this class action was filed.

3. Whether, if the district court did not have jurisdiction under 42 U.S.C. 405(g) over the claims of class members who had not exhausted their administrative remedies or sought judicial review within 60 days of the Secretary's final decision, the district court could exercise jurisdiction under the mandamus statute, 28 U.S.C. 1361, to require the Secretary to reopen and readjudicate those claims.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Statement	2
Discussion	7
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Dotson v. *Schweiker*, 719 F.2d 80	3
Heckler v. *Campbell*, 461 U.S. 458	11
Heckler v. *City of New York*, cert. granted, No. 84-1923 (Oct. 7, 1985)	8, 12
Heckler v. *Day*, No. 82-1371 (May 22, 1984)	5-6
Heckler v. *Kuehner*, No. 83-1593 (Nov. 5, 1984)	7
Heckler v. *Lopez*, No. 84-115 (Dec. 10, 1984)	7, 11
Heckler v. *Owens*, prob. juris. noted, No. 84-1905 (Oct. 15, 1985)	8, 14
Heckler v. *Ringer*, No. 82-1772 (May 14, 1984)	6, 12
Martin v. *Secretary of HEW*, 492 F.2d 905	2-3, 5, 10, 11, 12, 13
Mathews v. *Eldridge*, 424 U.S. 319	6, 12
Myers v. *Califano*, 611 F.2d 980	3, 9, 10
Stieberger v. *Heckler*, 615 F. Supp. 1315, appeal pending, No. 85-6310 (2d Cir.)	14
United States v. *Estate of Donnelly*, 397 U.S. 286	10
United States v. *Mendoza*, 464 U.S. 154	10
Weinberger v. *Salfi*, 422 U.S. 749	12

Statutes:

Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 *et seq.*	4
§ 2, 98 Stat. 1794	4, 5, 7
§ 2(d), 98 Stat. 1797-1799	4, 8, 9

Statutes—Continued: Page

§ 3(a), 98 Stat. 1799 ..... 5, 7, 9
§ 4, 98 Stat. 1800 13
42 U.S.C. 405(g) 2, 4, 5, 6, 7, 8, 11, 12

Miscellaneous:

130 Cong. Rec. S11454-S11455 (daily ed. Sept. 19, 1984) 10
H.R. Rep. 98-618, 98th Cong., 2d Sess. (1984) 9
H.R. Conf. Rep. 98-1039, 98th Cong., 2d Sess. (1984) 9
S. Rep. 98-466, 98th Cong., 2d Sess. (1984) 9
Social Security Administration, Department of Health and Human Services, *Social Security Rulings*, SSR 85-III-II (Apr. 1985) 12-13

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-474

PATRICK M. HYATT, ET AL., PETITIONERS

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 43-56) is reported at 757 F.2d 1455. The opinion of the district court (Pet. App. 58-91) is reported at 579 F. Supp. 985.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1985, and petitions for rehearing were denied on April 23, 1985 (Pet. App. 57). On July

3, 1985, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 20, 1985 (Pet. App. 42), and the petition was filed on September 19, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This class action was brought in the United States District Court for the Western District of North Carolina on behalf of applicants for and recipients of Social Security disability benefits in North Carolina. The suit was commenced on August 5, 1983, by Patrick Hyatt as an individual action under 42 U.S.C. 405(g) following the Appeals Council's decision affirming the termination of his disability benefits (C.A. App. 6; Pet. App. 64). Hyatt added a class action allegation in the first amended complaint, filed on October 5, 1983 (C.A. App. 15). Subsequently, two other claimants, Herman Caudle and Mary Lovingood, were added as named plaintiffs (Pet. App. 65-69).

The plaintiffs contended that: (i) the Secretary could not terminate an individual's disability benefits without showing that his medical condition had improved; (ii) Social Security Ruling (SSR) 82-55 unlawfully deemed diabetes mellitus and hypertension "non-severe" impairments unless they were accompanied by end-organ damage (*i.e.*, damage to the heart, eyes, kidneys, or brain); and (iii) SSR 82-58 unlawfully provided that subjective complaints of pain would not be considered disabling unless supported by objective clinical findings (Pet. App. 61-62). The plaintiffs alleged that the latter two policies were inconsistent with *Martin* v. *Secretary of*

HEW, 492 F.2d 905 (4th Cir. 1974), and *Myers* v. *Califano*, 611 F.2d 980 (4th Cir. 1980), respectively, and they contended that the Secretary therefore had "non-acquiesced" in Fourth Circuit decisions with regard to pain, hypertension, and diabetes (Pet. App. 61-62; see also *id.* at 72-75). The plaintiffs made similar allegations of non-acquiescence in the Fourth Circuit's decision in *Dotson* v. *Schweiker*, 719 F.2d 80 (1983), with respect to the medical improvement issue (Pet. App. 62), even though the Fourth Circuit's decision in that case had not yet become final.

In an opinion dated February 14, 1984 (Pet. App. 58-61), the district court held that the Secretary was required by the doctrine of separation of powers to apply the rulings in *Martin*, *Myers* and *Dotson* in reviewing the disability claims of *all* persons residing in the Fourth Circuit, not merely the individual claimants involved in those cases (Pet. App. 84-91). The court then entered a broad injunction requiring the Secretary to follow *Martin*, *Myers* and *Dotson* within North Carolina; to follow Fourth Circuit precedent generally when implementing the Social Security Act in North Carolina; and to instruct all Social Security Administration (SSA) and state agency personnel to follow Fourth Circuit decisions. Pet. App. 92-94.

In its subsequent class certification order dated March 26, 1984 (Pet. App. 95-101), the district court included within the class: (i) all North Carolina residents whose claims involved hypertension, diabetes or pain and whose applications were denied or whose benefits were terminated on or after September 10, 1981; and (ii) all North Carolina residents whose benefits were terminated on or after October

6, 1982, without a finding of medical improvement. Both dates were far more than 60 days prior to August 5, 1983 (when Hyatt filed this suit under 42 U.S.C. 405(g)) and October 5, 1983 (when he sought to represent a class), but the district court made no effort to reconcile its class definition with the 60-day filing requirement in 42 U.S.C. 405(g).

Moreover, the district court included these individuals in the class and granted them relief whether or not they had exhausted their administrative remedies and obtained a "final decision" on their individual claims for benefits, as required by 42 U.S.C. 405(g). The court so ordered because, in its view, the plaintiffs' legal argument that the Secretary was required to follow Fourth Circuit precedent was collateral to their claims for benefits, the plaintiffs would not be adequately compensated by a retroactive award of benefits, and exhaustion of administrative remedies would be futile (Pet. App. 81-84).

2. While the Secretary's appeal was pending, Congress enacted the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 *et seq.* That Act had a significant impact on this case.

a. In Section 2 of the 1984 Act (98 Stat. 1794), Congress enacted a new statutory medical improvement standard to govern the determination of whether a recipient of disability benefits continues to be disabled. Section 2(d) of the 1984 Act directed that any case that was then pending in court and presented the medical improvement question was to be remanded to the Secretary for redetermination under the standards in the 1984 Act (98 Stat. 1797-1799). This remand requirement applied to all named and unnamed members of certified classes in pend-

ing class actions, whether or not the individual class members had personally satisfied the exhaustion and 60-day filing requirements in 42 U.S.C. 405(g). Pet. App. 47-48. The court of appeals accordingly ordered the remand to the Secretary of the cases of all of the class members whose benefits had been terminated. Pet. App. 47-51, 55. The court of appeals declined petitioners' request that the Secretary be instructed to follow Fourth Circuit precedent with respect to the evaluation of pain when readjudicating the claims remanded pursuant to Section 2 of the 1984 Act, because Congress had enacted a specific statutory standard for the evaluation of pain in Section 3(a) of the 1984 Act (98 Stat. 1799).

Although the 1984 Act did not specifically address the evaluation of hypertension and diabetes, the court of appeals also rejected petitioners' contention that the Secretary should be instructed to follow the Fourth Circuit's decision in *Martin* when evaluating the claims of terminated class members who have those conditions. The court observed that the House version of the 1984 Act would have required the Secretary to acquiesce in the decision of a court of appeals within the circuit unless the Secretary sought review in this Court, and the Senate bill would have required the Secretary to report to Congress and publish in the Federal Register any determination to non-acquiesce in a particular decision. But the court found it significant that Congress ultimately did not adopt any provision addressing the subject of non-acquiescence. In the court of appeals' view, Congress's decision in 1984 not to require the Secretary to follow circuit precedent was analogous to Congress's refusal to impose time limits on the adjudication of disability claims, which this Court considered in *Heckler* v. *Day*, No. 82-1371 (May 22,

1984). The court of appeals therefore concluded that the district court's injunction requiring the Secretary to apply the decisions of the Fourth Circuit in the adjudication of all disability claims in North Carolina constituted " 'an unwarranted judicial intrusion into this pervasively regulated area.' " Pet. App. 50, quoting *Day*, slip op. 15.

b. The court of appeals next addressed the claims of class members who had filed new applications for benefits but whose applications had been denied. The 1984 Act did not provide for the automatic remand of the cases of such claimants, and the court of appeals therefore found it necessary to consider whether those class members had satisfied the jurisdictional requirements of 42 U.S.C. 405(g). The court of appeals first held that the district court erred in concluding that this case fell within the exception to the exhaustion requirement recognized in *Mathews* v. *Eldridge*, 424 U.S. 319, 330-332 (1976), and *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984), slip op. 14-15, because petitioners' contention that the Secretary was applying improper standards in evaluating pain, diabetes, and hypertension was inextricably intertwined with the class members' claims for benefits. Pet. App. 50-51. The court of appeals also held that the 60-day filing requirement in Section 405(g) is jurisdictional in nature and that the district court therefore was without authority to include in the class any individuals who had obtained a final decision of the Secretary more than 60 days before this class action was commenced. Pet. App. 52.

In light of these jurisdictional holdings, the court of appeals ordered the district court to dismiss the claims of all new-applicant class members who did not satisfy the exhaustion and 60-day filing require-

ments in 42 U.S.C. 405(g). With respect to the new-applicant class members who did satisfy the jurisdictional requirements and whose claims involved allegations of pain, the court instructed the district court to remand their claims to the Secretary to be reconsidered in light of the new statutory pain standard in Section 3(a) of the 1984 Act. Although the 1984 Act did not specifically address hypertension and diabetes, the court of appeals concluded that the Secretary also should have an opportunity to reconsider the claims of new-applicant class members who had such impairments, in view of circuit precedent and the legislative history of the 1984 Act addressing the subject of non-acquiescence. Pet. App. 52-53.

DISCUSSION

1. The court of appeals correctly remanded to the Secretary, for reconsideration under Section 2 of the Social Security Disability Benefits Reform Act of 1984, the cases of those class members whose benefits had been terminated. In the course of the readjudication of their individual claims on remand, the class members will have the opportunity to present any factual and legal arguments they wish concerning the evaluation of pain, hypertension and diabetes mellitus, as well as any other issues that bear on their claims for benefits. The court of appeals' order directing the remand of these class members' cases is consistent with this Court's orders in essentially identical circumstances in *Heckler* v. *Kuehner*, No. 83-1593 (Nov. 5, 1984), and *Heckler* v. *Lopez*, No. 84-115 (Dec. 10, 1984). This aspect of the court of appeals' judgment therefore plainly does not warrant review.

2. The court of appeals also correctly held that the district court did not have jurisdiction under 42 U.S.C. 405(g) over the claims of any of the new-applicant class members who had not satisfied the exhaustion and 60-day filing requirements. However, as petitioners point out (Pet. 16-26), similar jurisdictional issues are presented in *Heckler* v. *City of New York*, cert. granted, No. 84-1923 (Oct. 7, 1985), and *Heckler* v. *Owens*, prob. juris. noted, No. 84-1905 (Oct. 15, 1985). We therefore suggest that the Court hold the petition in this case and dispose of it in light of the decisions in *City of New York* and *Owens*. This is the same course we have suggested in *Heckler* v. *Polaski*, No. 85-55, which also presents the question whether exhaustion of administrative remedies was required in a class action challenging the Secretary's approach to the evaluation of pain.

3. Petitioners argue (Pet. 8-16, 24) that the Court should grant plenary review on the jurisdictional issues in this case, rather than hold the petition pending the decisions in *City of New York* and *Owens*, because it involves allegations of non-acquiescence. For several reasons, that course is not warranted.

a. There is no class representative who has a live claim before the Court and who can present the necessary arguments on behalf of other class members. There were only three class representatives in this case: Patrick Hyatt, Herman Caudle, and Mary Lovingood. All three previously had been found to be disabled and raised the medical improvement issue (Pet. App. 63-70), and the claims of all three therefore were subject to Section 2(d) of the 1984 Act, which directed an automatic remand of their individual cases to the Secretary for redetermination.

The effect of the court of appeals' remand pursuant to Section 2(d) was to dissolve the class action status of this case insofar as it related to medical improvement (see Pet. App. 51) and thereby to eliminate the status of the named plaintiffs as representatives of a class of other claimants (especially new applicants).

That is not the only defect in the status of the class representatives. In light of the new pain standard in Section 3(a) of the 1984 Act, petitioners concede (Pet. 7-8 n.8) that the court of appeals correctly vacated the district court's injunction requiring the Secretary to follow the Fourth Circuit's decision in *Myers* regarding pain.[1] This leaves the question of the Secretary's approach to the evaluation of hypertension and diabetes. Only two of the three class representatives—Caudle and Lovingood—had such claims (both of which involved hypertension, not

---

[1] The legislative history demonstrates that Congress intended in enacting Section 3(a) to ratify the Secretary's approach to the evaluation of pain that petitioners challenged in this case. See H.R. Conf. Rep. 98-1039, 98th Cong., 2d Sess. 29 (1984); S. Rep. 98-466, 98th Cong., 2d Sess. 23 (1984). In fact, the Senate Report severely criticized the courts that had not shown sufficient deference to the Secretary's regulatory authority to establish standards for the evaluation of pain (S. Rep. 98-466, *supra*, at 23), and the House Report likewise stated that "it is not appropriate for the Federal courts to establish policy on such an issue simply because the statute is insufficiently specific." H.R. Rep. 98-618, 98th Cong., 2d Sess. 14 (1984).

Although Congress has now emphatically endorsed the Secretary's approach and rejected that of a number of courts (necessarily including that of the Fourth Circuit in *Myers*, to the extent it could be construed to be inconsistent with the Secretary's approach), petitioners contend that the Secretary previously was constitutionally prohibited from even liti-

diabetes). See Pet. App. 63-70. However, on February 27, 1984, the ALJ reversed the state agency's decision and held that Lovingood continued to be disabled. Any objection Lovingood might previously have had to the Secretary's evaluation of hypertension therefore was rendered moot even before March 26, 1984, when the class was certified and she was designated as a class representative (*id.* at 95-97, 101).

Similarly, Herman Caudle died on October 24, 1983, before he was designated as a class representative (see Pet. App. 66-67, 97), and on May 3, 1984 the Appeals Counsel held that he had been disabled prior to his death. Any objection Caudle (or his widow) might previously have had to the Secretary's evaluation of hypertension was thereby also rendered moot. As a result, there is no class representative before the Court with standing to complain of alleged non-acquiescence by the Secretary in the Fourth Circuit's decision in *Martin*.

---

gating that issue in the Fourth Circuit in light of *Myers* and that the district court properly issued an injunction that effectively prevented the Secretary from doing so. This extreme and rigid rule has no place in our constitutional system of separation of powers among co-equal Branches. In fact, the rule petitioners advocate is nothing more than a rule of non-mutual collateral estoppel against the federal government, which this Court unanimously rejected in *United States* v. *Mendoza*, 464 U.S. 154 (1984). See also *United States* v. *Estate of Donnelly*, 397 U.S. 286, 294-295 (1970). The legislative history of the 1984 Act demonstrates that Congress understood the relationship between *Mendoza* and the "non-acquiescence" issue and acknowledged the litigating considerations that weigh against a rule of mandatory acquiescence. See 130 Cong. Rec. S11454-S11455 (daily ed. Sept. 19, 1984) (remarks of Sen. Dole); S. Rep. 98-466, *supra*, at 21; H.R. Conf. Rep. 98-1039, *supra*, at 37-38.

b. Although the district court believed that the approach to the evaluation of hypertension reflected in SSR 82-55 was inconsistent with the Fourth Circuit's decision in *Martin* (Pet. App. 72-74, 86), the Secretary argued that the two in fact were consistent.[2] The court of appeals did not address the Secretary's contention. It instead vacated the broad injunction entered by the district court and remanded to the Secretary the cases of all of the new-applicant class members who raised the hypertension issue and satisfied the jurisdictional requirements of 42 U.S.C. 405(g). This case therefore does not present a concrete issue of non-acquiescence.

c. Even if the issue were presented in a concrete posture, allegations of non-acquiescence in an appellate decision regarding the evaluation of hypertension would not permit a court to dispense with the jurisdictional prerequisite that the claimant obtain a "final decision" before seeking judicial review pursuant to 42 U.S.C. 405(g). Only after the Secretary has rendered her final decision on any individual class

---

[2] The Secretary pointed out that SSR 82-55 did not state that the Secretary would disregard Fourth Circuit precedent and that it therefore was quite different from the explicit statement of non-acquiescence involved in *Heckler* v. *Lopez*, *supra*. Appellants' Br. 16-18, 21-22. The Secretary further argued that *Martin* was distinguishable because it involved multiple impairments, whereas SSR 82-55 addressed the problem of hypertension or diabetes standing alone; that *Martin* was primarily concerned with the question whether substantial evidence supported the Secretary's decision; and that the Fourth Circuit had never held that SSR 82-55 or the regulations it implemented were invalid under the arbitrary and capricious standard of review required by *Heckler* v. *Campbell*, 461 U.S. 458, 466 (1983). Appellants' Br. 20-21, 23-27.

member's claim for benefits would it be clear how hypertension was evaluated and whether it even played a role in the Secretary's ultimate disposition of the claim. In this very case, for example, the only two named plaintiffs who suffered from hypertension were found to be disabled in the course of further administrative proceedings. The court of appeals therefore was clearly correct in concluding that petitioners' contention that the Secretary has applied an incorrect standard in evaluating hypertension did not fall within the narrow exception to the exhaustion requirement that was recognized by this Court in *Mathews* v. *Eldridge* and *Heckler* v. *Ringer* for issues that are "entirely" or "wholly" collateral to the substantive claim of entitlement to benefits.

It does not matter for these purposes that petitioners assert that, in their view, the Secretary was constitutionally obligated to follow a prior Fourth Circuit decision (*Martin*) that had taken a different approach. This Court made clear in *Weinberger* v. *Salfi*, 422 U.S. 749, 762-767 (1975), that even constitutional objections to the interlocutory denial of a claim on the merits cannot be presented to a court in an action under 42 U.S.C. 405(g) prior to full exhaustion of administrative remedies unless the *Secretary* has dispensed with the exhaustion requirement. The Secretary has not done so here.

d. In any event, circumstances have changed considerably since the time the district court entered its injunction, with the result that plenary review now is especially unwarranted:

First, in April 1985, HHS formally declared obsolete SSR 82-55, on which petitioners have premised their non-acquiescence argument with respect to the evaluation of hypertension. Social Security Adminis-

tration, Department of Health and Human Services, *Social Security Rulings*, SSR 85-III-II, at 47 (Apr. 1985).

Second, in Section 4 of the 1984 Act (98 Stat. 1800), Congress specifically addressed the authority of the Secretary to identify certain impairments as non-severe based on medical factors alone. The Fourth Circuit's criticism of that approach in its 12-year-old decision in *Martin* must now be considered by the Secretary in light of the intervening legislation.

Third, as petitioners acknowledge (Pet. 16), the Secretary adopted a new policy on the question of non-acquiescence in June 1985. See Interim Circular 185, reproduced at Pet. App. 35-40. Under the new policy, the Secretary will issue a formal SSR identifying each appellate decision that appears to be at variance with SSA policy and state how SSA will apply that decision within the circuit involved. Pet. App. 35-36. The Interim Circular also provides a mechanism for determining whether the Secretary will actually render a final decision on a claim for benefits under SSA policy rather than the different circuit rule. Pet. App. 36-40. We have been informed that SSA currently is conducting an exhaustive study of appellate decisions in order to identify areas of possible conflict with SSA policy, but that no formal SSRs identifying such areas have yet been promulgated. And even if such an SSR is issued at a later date with respect to a given circuit and issue, it would not be until the Appeals Council stage that the Secretary would make a final determination whether to apply the circuit rule in her decision on a particular claim for benefits. See Pet. App. 40. For these reasons, there is no ripe controversy in this

class action concerning possible future non-acquiescence by SSA in a court of appeals' decision. The new Interim Circular 185 also makes it particularly clear that petitioners are wrong in contending that exhaustion is not required simply because they allege "non-acquiescence" by the Secretary.[3]

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decisions in *Heckler* v. *Owens*, No. 84-1905, and *Heckler* v. *City of New York*, No. 84-1923, and then be disposed of in light of those decisions.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

DECEMBER 1985

---

[3] But see *Stieberger* v. *Heckler*, 615 F. Supp. 1315 (S.D.N.Y. 1985), appeal pending, No. 85-6310 (2d Cir.).

☆ U. S. GOVERNMENT PRINTING OFFICE, 1985 491507 20074

Supreme Court, U.S.
FILED
DEC 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-474

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PATRICK M. HYATT, HERMAN O. CAUDLE AND MARY P. LOVINGOOD, on behalf of themselves and all others similarly situated,

Petitioners,

v.

MARGARET M. HECKLER, or her successors in office, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent,

and

NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DISABILITY DETERMINATION SERVICES,

Intervenor-Nominal Respondent.

REPLY BRIEF OF PETITIONERS

JOHN R. WESTER
(Counsel of Record)
DAN T. COENEN
ROBINSON, BRADSHAW & HINSON, P.A.
1900 Independence Center
Charlotte, North Carolina 28246
(704) 377-2536

CHARLES McBRAYER SASSER
LEGAL SERVICES OF SOUTHERN PIEDMONT, INC.
6th Floor, 951 South Independence Boulevard
Charlotte, North Carolina 28202
(704) 376-1608

Attorneys for Petitioners

BEST AVAILABLE COPY

TABLE OF CONTENTS

Discussion 1

Conclusion 6

TABLE OF AUTHORITIES

CASES:

Adamson v. Heckler,
Civ. A. No. 84-C-2024 (D. Colo.), *appeal pending*, No. 85-2396 (10th Cir. 1985) 6

Aldrich v. Heckler,
1985 CCH Unemp. Ins. Rep. ¶16, 369 (June 25, 1985) 6

Davis v. Passman,
442 U.S. 228 (1979) 4

Deposit Guaranty National Bank v. Roper,
445 U.S. 326 (1980) 3

Franks v. Bowman Transport Co.,
424 U.S. 747 (1976) 3

Heckler v. City of New York,
cert. granted, No. 84-1923 (Oct. 7, 1985) 2

Heckler v. Day,
____U.S.____, 104 S. Ct. 2249 (1984) 3

Heckler v. Kuehner,
____U.S.____, 105 S. Ct.
376 (1984) 2

Heckler v. Lopez,
____U.S.____, 105 S. Ct. 583
(1984) 2

Heckler v. Owens,
prob. juris. noted, No. 84-1905
(Oct. 15, 1985) 2

Johnson v. Heckler,
769 F.2d 1202 (7th Cir. 1985) 5

Martin v. Secretary of HEW,
492 F.2d 905 (4th Cir.,
1974) 1

Sosna v. Iowa,
419 U.S. 393 (1975) 3

Steiberger v. Heckler,
615 F. Supp. 1315 (S.D.N.Y.
1985), *appeal pending*, No. 85-6310 (2d Cir. 1985) 3,5,6

United States v. Concentrated Phosphate Export Assocs.,
393 U.S. 199 (1968) 5

United States v. W.T. Grant Co.,
345 U.S. 629 (1953) 5

Vitek v. Jones,
445 U.S. 480 (1980) 5

Wilkerson v. Heckler,
Civ. A. No. 84-2548 (E.D.Pa.) 6

Yuckert v. Heckler,
774 F.2d 1365 (9th Cir. 1985) 5

STATUTES and RULES

42 U.S.C. § 405 (g) 1

20 C.F.R. § 404.969 4

S. Ct. Rule 37.3 2

MISCELLANEOUS:

A. Fried, *A Disability Appeal Primer*, West's Soc. Sec. Rep. Serv. Vol. 9, No. 2, at p. 245, 247 n. 10 6

Newberg on Class Actions § 2.29 (2d ed. 1985) 3

Pear, *U.S. Will Resume Reviews of Rolls for Disability Aid*, N.Y. Times, Dec. 6, 1985, p. 1, col. 6 6

R. Stern & E. Gressman, *Supreme Court Practice*, § 14.10, at 752 (5th ed. 1978) 2

No. 85-474

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PATRICK M. HYATT, HERMAN O. CAUDLE AND MARY P. LOVINGOOD on behalf of themselves and all others similarly situated,

Petitioners,

v.

MARGARET M. HECKLER, or her successors in office, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent,

and

NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DISABILITY DETERMINATION SERVICES,

Intervenor-Nominal Respondent.

DISCUSSION

A Petition for Certiorari was filed in this case because the Court of Appeals erred in two separate ways. First, the Court of Appeals excluded from class membership all initial applicants for benefits who had not fully exhausted administrative remedies and formally satisfied the 60-day time requirement set forth in 42 U.S.C. § 405(g). Second, the Court of Appeals vacated the District Court's injunction ordering the Secretary to stop nonacquiescing in Fourth Circuit law and to follow in particular that Court's holding in *Martin v. Secretary of HEW*, 492 F.2d 905 (4th Cir. 1974). In their Petition for Certiorari, petitioners independently challenged each of these actions.

The Secretary of Health and Human Services has now filed her Brief for the Respondents in response to the Petition. That Brief

lumps together in a confusing manner analysis of the petitioners' two distinct challenges to the Court of Appeals' decision.[1] In addition, the Response seeks to suggest that the issues in this case are procedurally encumbered and fact-specific. That is not the case. In fact, this case presents pure and concrete questions of law of extraordinary continuing importance both in and beyond the context of this case. These issues merit the prompt attention of the Court.

A. *The Class-Scope Issues.*

As the Secretary recognizes, the exhaustion, 60-days, and mandamus issues in this case resemble issues already before the Court in *Heckler v. City of New York*, cert. granted, No. 84-1923 (Oct. 7, 1985), and *Heckler v. Owens*, prob. juris. noted, No. 84-1905 (Oct. 15, 1985). Accordingly, as the Secretary acknowledges, this Petition should at a minimum be held pending resolution of those cases. Brief for the Respondents 8, 14 (Point 2). As pointed out in the Petition, however, the nonacquiescence feature of this case makes the class-scope arguments here far stronger than those in *City of New York* or *Owens*. *See* Petition for Certiorari 23-24, 25-26. Accordingly, a grant of certiorari on the class-scope issue remains appropriate notwithstanding the pendency of those cases.[2] Even more significantly, however, the pendency of *City of New York* and *Owens* does not in any way justify a "hold" of the separate injunction issue presented by this Petition.

---

[1]It also advances a number of arguments that are simply beside the point. *See* Brief For the Respondents 11 n.1 (addressing pain-injunction issue which is no longer in the case); *id* at 11-12 (Point 3c, restating exhaustion arguments being made in *City of New York* and *Owens* cases despite acknowledgement that this case should be held pending their resolution); *id* at 7 (Point 1; invoking *Heckler v. Kuehner*, No. 83-1593, and *Heckler v. Lopez*, No. 84-115, although brief orders in those pure medical improvement cases did not in any way dispose of the class-scope and injunction issues presented by the Petition here).

[2]It is not uncommon for the Court to grant certiorari in related cases and then to schedule argument in those cases for the same day. *See* R. Stern & E. Gressman, *Supreme Court Practice*, § 14.10, at 752 (5th ed. 1978); *see also* S. Ct. Rule 37.3. Neither *City of New York* nor *Owens* has yet been set for oral argument, and petitioners are prepared to comply with any expedited briefing schedule necessary to hear all these cases in the same argument session.

B. *The Injunction Issue.*

The Fourth Circuit held in this case that *Heckler v. Day*, ____ U.S. ____, 104 S. Ct. 2249 (1984), and the legistative history of the 1984 Act preclude the issuance of injunctions to remedy the Secretary's policy of nonacquiescence. App. 49-50. As explained in the Petition for Certiorari, the Fourth Circuit erred severely in adopting this expansive reading of *Day*. *See* Petition for Certiorari 9-15; *accord*, *Steiberger v. Heckler*, 615 F. Supp. 1315, 1375-76 (S.D.N.Y.), appeal pending, No. 85-6310 (2d Cir. 1985). Indeed, the most telling aspect of the Secretary's responsive brief is that it makes *no effort whatsoever* to defend the Fourth Circuit's holding on the injunction issue.

Instead, the Secretary seeks to marshall peripheral arguments why this Court should not intervene to correct the Fourth Circuit's error. She first argues, without citation to any authority, that the case is "moot" because certain named plaintiffs have secured the relief they sought. Brief for the Respondents 8-10 (Point 3a). In particular, the Secretary argues that Herman Caudle's hypertension claim was mooted on May 3, 1984, when his estate received a favorable disability determination. *Id.* at 10. By that date, however, the District Court had already certified the class and the Secretary had appealed. *See* A-101; Notice of Appeal (attached as Exhibit A). It clearly follows that the Secretary's class-representative mootness argument is without merit. *E.g.*, *Franks v. Bowman Transport Co.*, 424 U.S. 747, 755-57 (1976); *Sosna v. Iowa*, 419 U.S. 393 (1975); *see generally* Newberg on Class Actions § 2.29 (2d ed. 1985) ("The Supreme Court has broadly declared that when claims of a class representative in a certified class action become moot on appeal because of intervening events or changing conditions, the appeal will not be dismissed as moot . . . ").[3]

[3]There are at least two other reasons why the Secretary's mootness argument should be rejected. First, the Secretary herself has separately appealed the District Court's attorneys fee award to plaintiffs during the pendency of this proceeding in this Court. Thus, the Secretary's own actions have kept the named plaintiffs involved and interested in this case, particularly because a victory in this Court would remove any conceivable doubt about the Secretary's argument in opposition to the fee award that the plaintiffs are not "prevailing parties." *See Deposit Guaranty National Bank*

The Secretary next argues that review by this Court is inappropriate because the Fourth Circuit did not consider whether the Secretary's policies conflicted with *Martin*. Brief for the Respondents 11 (Point 3c). The premise of the Secretary's argument is doubtful. *See* Petition for Certiorari at 7 n.7. Even more importantly, however, this contention is beside the point because the Fourth Circuit did explicitly hold that injunctive relief is never available in nonacquiescence cases, and that question is squarely presented here. After resolving the question presented by this Petition, this Court may, if it deems it appropriate, return the case to the Fourth Circuit to examine the District Court's finding that the Secretary's policy violated *Martin*. Indeed, that is the practice routinely followed by this Court. *E.g., Davis v. Passman*, 442 U.S. 228, 248-49 (1979) (reversing Court of Appeals holding that damage remedy unavailable for Fifth Amendment violation, but remanding for further consideration of issue, not previously addressed by lower court, whether particular claim is legally cognizable). Moreover, this practice is a wise one because otherwise important issues, like the injunction issue presented here, would escape Supreme Court review merely because an alternative argument in support of a judgment was not considered by the lower court.

Finally, the Secretary relies on "changed circumstances" in seeking to avoid this Court's review of the Fourth Circuit's broad prohibition on injunctions. Brief of Respondents 12-14. Again, any inquiry into the continuing appropriateness of the particular injunction at issue here (or of any portion of it, such as the portion specifically dealing with *Martin*) would be appropriate only on remand once this

---

v. Roper, 445 U.S. 326, 335-36 & n.6 (1980) (rejecting mootness argument based on named plaintiffs' continuing interest in sharing litigation expenses). Second, the Secretary's mootness argument must be rejected because it was her *own action* in awarding benefits to these named plaintiffs that purportedly mooted this class action. *See id.* at 339 ("to deny the right of appeal simply because the defendant has sought to buy off the individual private claims of the named plaintiffs would be contrary to sound judicial administration"). Notably, the Secretary also fails to mention that Ms. Lovingood's claim, like Mr. Caudle's, was a live one after the class certification and appeal because the disability determination concerning her remained subject to Appeals Council review and reversal through April 28, 1984, 20 C.F.R. § 404.969.

Court has reviewed the Fourth Circuit's far-reaching and purely legal determination that *no* injunctions are *ever* permissible in nonacquiescence cases.[4]

In any event, the "changed circumstances" cited by the Secretary cannot change the fact that these class members, including the many class members who fully exhausted administrative remedies, were subjected to the Secretary's policy of nonacquiescence. During the pendency of this case, the Secretary has reaffirmed her continuing intention to nonacquiesce to a substantial degree in decisions of the United States Courts of Appeals. *See* Petition for Certiorari at 16; Brief for the Respondents 13. There is no reason why all proper class members should not have the benefit of the District Court's wholly proper injunction to ensure that they are not subjected to the Secretary's nonacquiescence policy once again. *See Steiberger v. Heckler*, 615 F. Supp. 1315, 1367-74 (S.D.N.Y. 1985) (enjoining Secretary's nonacquiescence policy despite promulgation of Interim Circular 185).

---

[4]In addition, the Secretary's "changed circumstances" argument is, when properly characterized, nothing more than a claim of mootness based on her own purported or contemplated modifications of policy on nonacquiescence in general and the treatment of hypertention and diabetes in particular. *See* Brief for the Respondents 13-14 (citing changed circumstances as showing that "there is no ripe controversy"). Yet it is well established that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *accord, e.g., United States v. Concentrated Phosphate Export Assocs.*, 393 U.S. 199, 203 (1968); *see also Vitek v. Jones*, 445 U.S. 480, 486 (1980). It bears emphasis in this regard that section 4 of the 1984 Act (attached hereto as Exhibit B) lends no weight at all to the Secretary's "changed circumstances" contention. Brief of the Respondents 13 (Point 3d, Second). In fact, that provision -- which affirmatively instructs the Secretary to consider the combined effect of multiple impairments -- has *absolutely nothing* to do with this case or with *Martin* -- which invalidated the Secretary's conclusive presumption that hypertension or diabetes can never be disabling without end-organ damage. The Secretary implies that section 4 somehow expands her authority to define certain medical conditions as *ipso facto* non-disabling, but courts construing section 4 have consistently rejected this view. *E.g., Johnson v. Heckler*, 769 F.2d 1202, 1212, (7th Cir. 1985); *Yuckert v. Heckler*, 774 F.2d 1365, 1370, (9th Cir. 1985). In any event, *Martin* in no way "critici[zed] this approach," Brief of the Respondents 13; rather it struck down as unsupported and unjustified only the particular conclusive presumption concerning hypertension and diabetes at issue in that case, 492 F.2d at 910.

Contrary to the Secretary's suggestions, recent developments *confirm* the need for Supreme Court review of this case. Nonacquiescence cases continue to be initiated and litigated throughout the nation.[5] Moreoever, on December 5, 1985, the Secretary announced that she would begin again a nationwide review of tens of thousands of disability files — precisely the same wholesale reevaluation process that first led to this and similar litigation. Pear, *U.S. Will Resume Reviews of Rolls for Disability Aid*, N.Y. Times, Dec. 6, 1985, p. 1, col. 6. These factors underscore the need to correct the Fourth Circuit's holding that the Secretary may continue to flout controlling circuit court authority free from the threat of injunctive relief.

CONCLUSION

This case involves thousands of persons seriously harmed by the Secretary's policy of nonacquiescence. These claimants were deprived of a needed and wholly lawful remedy because the Court of Appeals committed clear error. The Secretary's effort to shift attention away from the real issues in this important case is wrong and should be rejected. Petitioners accordingly submit that their Petition for Certiorari be granted.

---

[5]Many of the cases are mentioned in *Steiberger*. *See also* A. Fried, *A Disability Appeal Primer*, West's Soc. Sec. Rep. Serv. Vol. 9, No. 2, at p. 245, 247 n.10 (July 1985) (collecting "[e]xamples of the many cases involving nonacquiescence"). Recently commenced and unreported cases include *Adamson v. Heckler*, Civ. A. No. 84-C-2024 (D. Colo.), appeal pending, No. 85-2396 (10th Cir. 1985) (treating physician issue); *Wilkerson v. Heckler*, Civ. A. No. 84-2548 (E.D.Pa.) (alcoholism issue); *see also Aldrich v. Heckler*, 1985 CCH Unemp. Ins. Rep. ¶16,369 (June 25, 1985) (treating physician and pain issues).

Respectfully submitted,

JOHN R. WESTER
(Counsel of Record)

DAN T. COENEN

ROBINSON, BRADSHAW & HINSON, P.A.
1900 Independence Center
101 North Tryon Street
Charlotte, North Carolina 28246
(704) 377-2536

CHARLES MCBRAYER SASSER

LEGAL SERVICES OF SOUTHERN PIEDMONT, INC.
6th Floor, East Independence Plaza
951 South Independence Boulevard
Charlotte, North Carolina 28202
(704) 376-1608

Attorneys for Petitioners

Dated: December 16, 1985

EXHIBIT A

[Filed April 5, 1984]

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

PATRICK H. HYATT, HERMAN O. CAUDLE,
and MARY P. LOVINGOOD,
Plaintiffs,

vs.

MARGARET HECKLER, or her Successors in Office,
Secertary of the United States Department of Health
and Human Services,
Defendant

CIVIL NO. C-C-83-0655-M

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the above-named Defendant hereby appeals to the United States Court of Appeals for the Fourth Circuit from the decision of this court entered in the above-captioned proceeding on the 27th day of March, 1984, and all previous adverse judgments.

This the 5th day of April, 1984.

Charles R. Brewer
United States Attorney

/s/ RICHARD S. POE
RICHARD S. POE
Assistant U.S. Attorney

EXHIBIT B

MULTIPLE IMPAIRMENTS

SEC. 4. (a)(1) Section 223(d)(2) of the Social Security Act is amended by adding at the end thereof the following new subparagraph:

"(C) In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Secretary does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process."

(2) The third sentence of section 216(i)(1) of such Act is amended by inserting "(2)(C)," after "(2)(A),".

(b) Section 1614(a)(3) of such Act is amended by adding at the end thereof the following new subparagraph:

"(G) In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Secretary does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.".

(c) The amendments made by this section shall apply with respect to determinations made on or after the first day of the first month beginning after 30 days after the date of the enactment of this Act.